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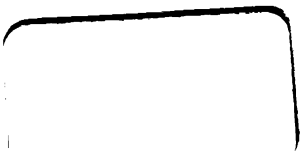
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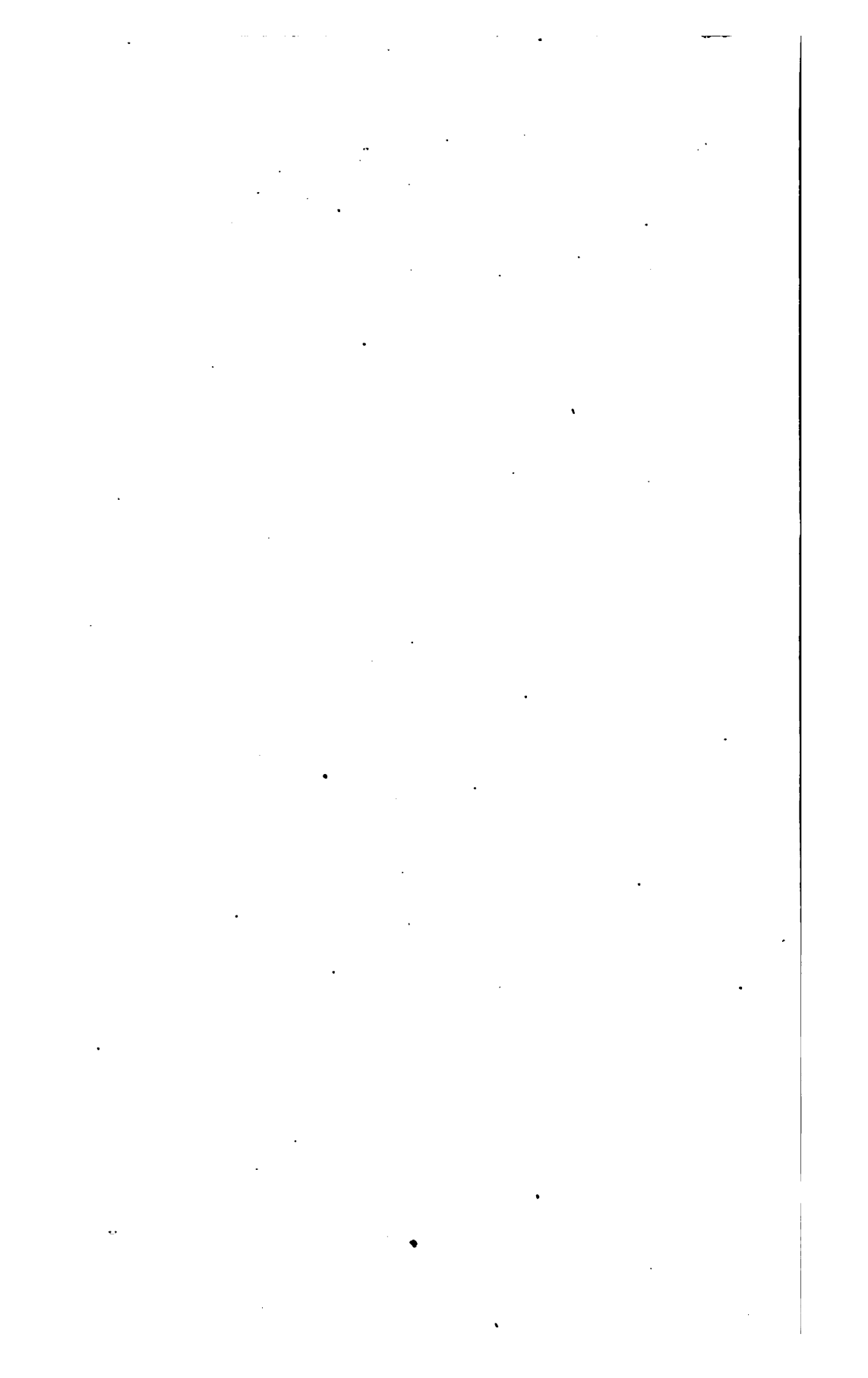
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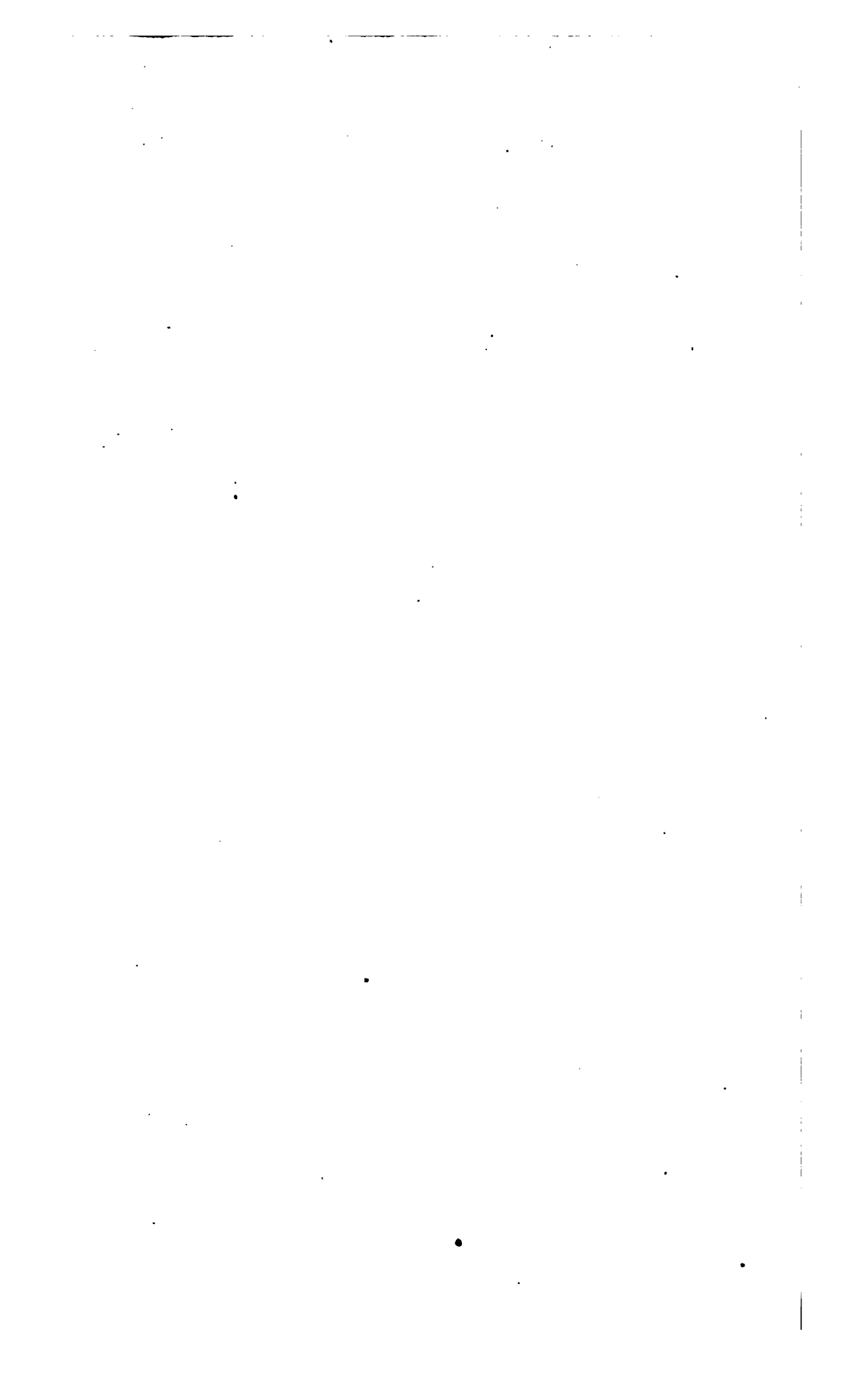
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REPORTS  
OF  
DECISIONS  
IN  
THE SUPREME COURT  
OF  
THE UNITED STATES.

BY SAMUEL F. MILLER, LL.D.,  
AN ASSOCIATE JUSTICE OF THE COURT.

VOLUME IV.

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DECISIONS  
OF THE  
SUPREME COURT OF THE UNITED STATES,  
DECEMBER TERM, 1860.

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JUSTICES OF THE COURT.

HON. ROGER B. TANEY, CHIEF JUSTICE.

HON. JOHN MCLEAN,

HON. JAMES M. WAYNE,

HON. JOHN CATRON,

HON. SAMUEL NELSON,

HON. ROBERT C. GRIER,

HON. JOHN A. CAMPBELL,

HON. NATHAN CLIFFORD,

JEREMIAH S. BLACK, } ATTORNEY GENERAL, DURING DIFFERENT  
EDWIN M. STANTON, } PARTS OF THIS TERM.

WILLIAM THOMAS CARROLL, CLERK.

BENJAMIN C. HOWARD, REPORTER.

WILLIAM SELDEN, MARSHAL.

ASSOCIATE JUSTICES.

Mr. JUSTICE DANIEL died during the recess, and the vacancy was not filled during this term.

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FRANKLIN MOORE and others, Plaintiffs in Error, v. THE AMERICAN  
TRANSPORTATION COMPANY.

24 H. 1.

CONSTRUCTION OF STATUTES—INLAND NAVIGATION.

The act of congress of March 3d, 1851, (9 U. S. Statutes, 635,) which exempts ship owners from liability for loss by fire, provides that the act "shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation." Held, that a steamboat used in navigating the waters of the great lakes from Buffalo to Detroit was not within the exception of the *proviso*, as she was not used in inland navigation—Because:

1. The great lakes are fresh water seas lying between us and a foreign nation, and along the borders of different States of the Union.
2. The words "barges," "canal boats," and "lighters," and vessels used in navigating rivers, are to be taken as suggestive of the class of other vessels used in inland navigation.

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Moore v. The American Transportation Co.

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3. One purpose of the act was to place our ship owners on equal condition with foreign owners; and the policy of the law seems to be as applicable to the immense commerce of the great lakes as to ocean vessels.

THIS was a writ of error to the supreme court of the State of Michigan, under the 25th section of the judiciary act. The case is well stated in the opinion.

*Mr. Russell and Mr. Walker*, for plaintiffs in error.

*Mr. Hibbard*, for defendants.

[ \* 34 ] \* Mr. Justice NELSON delivered the opinion of the court.  
This is a writ of error to the supreme court of the State of Michigan.

The suit was brought by the plaintiffs in the court below against the defendants, a company incorporated under the laws of New York, and owners of the steam propeller *M. B. Spaulding*.

The goods in question were put on board of the propeller at Buffalo, on the 30th October, 1856, for transportation to Detroit, and on the next day they took fire, and vessel and goods were entirely consumed, without any default or negligence of the master or crew, or any knowledge of the defendants, their officers or agents. The propeller was of more than twenty tons burden, and was enrolled and licensed for the coasting trade, and engaged in navigation and commerce, as a \* common carrier, between ports and places in different States upon the lakes, and navigable waters connecting the same.

The defendants relied, in their defense, upon the act of congress, passed March 3d, 1851, entitled "An act to limit the liability of ship owners, and for other purposes."

The 1st section provides that no owner of any ship or vessel shall be liable to answer for any loss or damage which may happen to any goods or merchandise which shall be shipped on board any such ship or vessel, by reason of any fire happening on board the same, unless such fire is caused by design or neglect of such owner, with a proviso that the parties may make such contract between themselves on the subject as they please.

The 2d section provides against any liability of the owner of the vessel, in case of precious metals, &c., unless notice and entry on the bill of lading.

The 3d section provides against liability of the owner, in cases of embezzlement or loss, &c., by the master, officers, &c., of any property shipped on board, or for any loss by collision, &c., with-

out the privity or knowledge of the owner, exceeding the value of his interest in the ship and freight.

The 4th section provides for an apportionment of the proceeds, in case of the sale of the vessel, among the several freighters or owners of the goods, if these and the freight should not be sufficient to pay each loss.

The 6th section saves the remedy against the master and hands, in case of embezzlement or loss, or for any negligence or malversation by these persons.

The 7th section, after providing a penalty for shipping oil of vitriol, and such dangerous materials, without notice to the master, is as follows: "This act shall not apply to the owner or owners of any canal boat, barge or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation."

It is insisted, on the part of the plaintiffs, that the navigation of Lake Erie, and also of all the other lakes in connection therewith, is within the exception to this act, as falling within the words "inland navigation." The question thus raised is \*not without difficulty, as we have no clear or certain [ \* 36 ] guide to lead us to the true meaning attached to these words by congress. Looking at them in a very general sense, and without much regard to the reasons or policy of the law, it may, with some plausibility, be urged, as has been on behalf of the plaintiffs, that the phrase "inland navigation" was used as contradistinguished from navigation upon the ocean; and that all vessels navigating waters within headlands, and after they have passed out of the ocean, come within the designation. But a construction thus broad can hardly be maintained, for it would be unreasonable to suppose that congress intended to apply one rule of responsibility to the owner in respect to the same vessel upon the ocean, and another upon the bays or rivers, in the course of the same voyage. Besides the absence of any good reason for such a distinction as to the rule of responsibility, it would have seriously embarrassed all parties engaged in commerce of this description in respect to their securities against accidents, and losses by means of insurance, bills of lading, charter-parties, &c.

The connection in which this term "inland navigation" is used in the act, we think, may throw some light upon the intent of the law-makers.

It is declared, that the act shall not apply to the owner of any canal-boat, barge, or lighter, or to any vessel of any description used in rivers or inland navigation. It will be seen, that certain craft is excepted from the act *eo nomine*, and then a class of vessels

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without any designation, other than by a reference to the waters or locality in which used. But the character of the craft enumerated may well serve to indicate to some extent, and with some reason, the class of vessels in the mind of the law-makers, which are designated by the place where employed. This class may well be regarded *ejusdem generis*, and thus aid us in interpreting the true meaning of the words of the act, namely, vessels "used in rivers or inland navigation."

Many of the provisions of this act were taken from the 53 Geo. 3, c. 159, as also the exception to the enacting clause. The [ \* 37 ] exception in the English act is as follows; that nothing \* in this act shall extend to the owner of any "lighter, barge, boat, or vessel of any description whatsoever, used solely in rivers or inland navigation."

The language of this exception is more specific than that used in ours; but the meaning intended to be conveyed, we think substantially the same. The words in ours are, "any vessel of any description whatsoever, USED in rivers or inland navigation." This word *used* means, in the connection found, *employed*, and doubtless, in the mind of congress, was intended to refer to vessels solely employed in rivers or inland navigation. It was this species of navigation—that is, on rivers and inland—which was intended to be withdrawn from the limitation of the liability of the owner; and the addition of the term "inland navigation," as an alternative to rivers, was doubtless designed, speaking in a general sense, to embrace all internal waters, either connected with rivers, but which did not, in a geographical or popular sense, fall under that name, or which might not be connected with rivers, but fell within the reason or policy of the exception, such as bays, inlets, straits, &c. Vessels, whatever may be their class and description, solely employed upon these waters, are usually employed in the trade and traffic of the localities, carried on chiefly by persons residing upon their borders, and connected with the local business, and without the formalities and precautions observed in regular commercial pursuits, with a view to guard against accidents and losses, such as insurance, bills of lading, &c. It was fit and proper, therefore, in this description of trade and traffic, that the common-law liabilities of the carrier should remain unaltered.

But the business upon the great lakes lying upon our northern frontiers, carried on between the States, and with the foreign nation with which they are connected, (and this is the only business which congress can regulate, or with which we are dealing,) is of a very different character. They form a boundary between this

foreign country and the United States for a distance of some twelve hundred miles, and are of an average width of at least one hundred miles; and this, without including Lake Michigan, of itself three hundred and fifty \* miles in length, and ninety in [ \* 38 ] breadth, which lies wholly within the United States. The aggregate length of these lakes is over fifteen hundred miles, and the area covered by their waters is said to be some ninety thousand square miles. The commerce upon them corresponds with their magnitude.

According to the best official statistics, the value of the property annually, the subject of this commerce, exceeds \$600,000,000, employing more than sixteen hundred vessels, with an aggregate tonnage exceeding four hundred thousand tons. The vessels are duly licensed for the foreign trade, as well as for that carried on coastwise. This commerce, from its magnitude, and the well-known perils incident to the lake navigation, deserves to be placed on the footing of commerce on the ocean; and, we think, in view of it, congress could not have classed it with the business upon rivers, or inland navigation, in the sense in which we understand these terms.

These lakes are usually designated by public men and jurists, when speaking of them, as great inland waters, inland seas, or great lakes; and, if congress intended to have excluded them from the limitation of the liabilities of owners, it would have been most natural and reasonable, and, indeed, almost a matter of course, to have referred to them by a more specific designation.

The decision in the case of the *Lexington*, which was burned upon Long Island Sound, led to this act of 1851. That case was decided in 1848, subjecting the carrier in case of a loss by fire. (6 How. 344.)

The sound is but one hundred and ten miles in length, and from two to twenty in breadth.

The waters of these lakes, in the aggregate, exceed those of the Baltic, the Caspian, or the Black Sea, and approach in magnitude those of the Mediterranean. They exceed those of the Red Sea, the North Sea or German Ocean, the Sea of Marmora, and of Azoff. And, like the lakes, all of these seas, with the exception of the North Sea, are tideless. The marine disasters upon these lakes, in consequence of the few natural harbors for the shelter of vessels, and the consequent losses of life and property, are immense.

According to the \* report of a committee in the House of [ \* 39 ] Representatives in 1856, the destruction of property upon Lake Michigan in the year 1855 exceeded \$1,000,000. The ap-

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palling destruction of life in the loss of the *Erie* upon Lake Erie, and of the *Superior* and *Lady Elgin* upon Michigan, are still fresh in the recollections of the country. The policy and justice of the limitation of the liability of the owners, under this act of 1851, are as applicable to this navigation as to that of the ocean. The act was designed to promote the building of ships, and to encourage persons engaged in the business of navigation, and to place that of this country upon a footing with England and on the continent of Europe. The act not only exempts the owner from the casualty of fire, but limits his liability in cases of embezzlement or loss of goods on board by the master, officers, &c., and also for loss or damage from collisions, and, indeed, for any loss or damage occurring without the privity of the owner, to an amount not exceeding the value of the vessel and freight.

It has been suggested that our construction of the act may embrace within the limitation of the liability of the owners western lakes lying within a State, such as the Cayuga, Seneca, and the like. But the answer is, that commerce upon the lakes, and all others similarly situated, is not within the regulation of congress. The act can apply to vessels only which are engaged in foreign commerce, and commerce between the States. The purely internal commerce and navigation of a State is exclusively under State regulation.

We think the court below was right, and that the judgment should be affirmed.

Mr. Justice CATRON dissenting.

By the common law of England ship owners were common carriers, and insurers against loss, of the goods shipped, without limitation as to the waters upon which the ships were navigated. Abbott on Shipping, 395. In the United States the same law governed. 2 Kent's Com. 599. *N. J. S. Nav. Co. v. Merchants'*

Bank, 6 How. 334. In parts of continental Europe the [ \* 40 ] law was different. The preamble of the British \* act of 7 Geo. 3d, declares, "that it was of the greatest consequence and importance to the kingdom to promote and increase the number of ships and vessels, and to prevent any discouragement to merchants, and others, from being interested and concerned therein." The object of the British legislation was "to encourage persons to become owners of ships." By the act of Geo. 2d, and others, the parliament exempted ship owners from liability in several cases of loss, and among them, loss by fire. That these laws applied to commerce on the ocean, is not controverted. Nor are they



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in force on the great lakes, partly belonging to Great Britain, on this continent.

Our act of congress of March 3, 1851, was passed to put our commercial marine on an equal footing with that of Great Britain; so that the increase of the number of ships, and the navigation of them, might be equally encouraged. That *competition* with British shipping was the object of congress, is manifest to my mind from the fact that the provisions of our statute correspond to British statutes. As there was no competition on our lakes, great or small, there was no reason for exempting owners of vessels from liability; and especially, for the reason that a vessel navigating a lake from one port to another, in the same State, is not within the act; as congress could only legislate by force of the commercial power, and regulate commerce among the States. The act of 1851 does not in terms, nor by any fair intendment, as I think, attempt to regulate such internal commerce. Fearing, however, that it might be held to apply to actual navigation, an exception was appended to the act, declaring that it should not apply to owners of canal boats, nor to lighters or barges. This description of vessels were brought into, or used, in harbors and bays; and these being arms of the sea might be held as coming within the provisions of the act of congress, the commerce they were engaged in being connected with that on the ocean. The commerce on the Chesapeake, through the tide-water canal, into the Delaware, by vessels propelled by steam, and the commerce carried on through the Hudson, into New York harbor, by canal boats and barges, shows the \* reason why the exception was made, as respects this [ \* 41 ] class of vessels.

And then comes the exception, of vessels that had no connection with commerce on the ocean, which declares, that the act shall not apply to any vessel, of any description whatsoever, used in rivers, or used in inland navigation. Why should navigation on the Mississippi and the St. Lawrence be governed by one law, and the great lakes, Green bay, Lake Champlain, Great Salt Lake, Utah Lake, and many others, by another rule of liability? Congress has made no such distinction; but on the contrary, every section and clause of the act of 1851 refer to losses happening on, or to vessels navigating, the ocean. The third section is especially significant of this conclusion.

What the expression, "inland navigation," means, must be ascertained from the geography of our own country, and the commerce carried on by vessels on its waters. Lake Erie is inland, and a voyage from Buffalo to Detroit is, in my judgment, "inland

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navigation." I am, therefore, of the opinion that the judgment should be reversed.

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BRADDOCK JONES, Plaintiff in Error, v. JAMES G. SOULARD.

24 H. 41.

RIPIARIAN OWNERSHIP—BOUNDARIES ON THE MISSISSIPPI.

1. All grants of land bounded by fresh water rivers, where the expressions designating the water line are general, confer proprietorship to the middle thread of the stream.
2. The owner of such a grant becomes entitled to accretions as they are formed.
3. This rule applies to the great navigable rivers, such as the Mississippi, as well as others.
4. The boundary line of the State of Missouri and of the city of St. Louis is the middle of the main channel of that river; and survey No. 404 of school lands of St. Louis, covering Duncan's Island, was rightfully made, though the island was made land since the grant of these lands for school purposes in 1812, and since the incorporation of St. Louis as a town.

THIS is a writ of error to the circuit court for district of Missouri. The facts are sufficiently stated in the opinion.

*Mr. Garesche and Mr. Blair*, for plaintiff in error.

*Mr. Garrett*, for defendant.

- [ \* 63 ] \*MR. JUSTICE CATRON delivered the opinion of the court.
- Soulard sued Jones to recover the northern part of
- [ \* 64 ] a United States survey of land laid off for the St. Louis schools. The part sued for fronts the Mississippi, and includes a sand-bar, formerly covered with water when the channel of the river was filled to a navigable stage. The land is included in the survey approved June 15th, 1843, designating the school lands; and the controversy would be governed beyond dispute by the principles declared in the case of *Kissell v. St. Louis Public Schools*, (18 How.) had this been fast land in 1812, when the grant to the schools was made. But it is insisted that the title to this accretion within the Mississippi river did not pass by the act of 1812, and remained in the United States till the State of Missouri became one of the States of the Union, in 1820, when the title vested in the State as a sovereign right to land lying below ordinary high-water mark. And furthermore, that if the State did not take by force of her sovereign right, she acquired a good title to the land known as Duncan's Island by the act of congress to reclaim swamp lands. These claims the State conveyed by a statute to the city of St.

Louis, and that corporation conveyed them to Jones, the plaintiff in error.

Soulard claims under the corporation of the St. Louis schools. The school survey No. 404 contains  $78\frac{26}{100}$ ths acres, including the land in controversy.

The town of St. Louis was incorporated in 1809 by the common pleas court of St. Louis county, in conformity to an act of the territorial legislature passed in 1808, and the only contested question in the cause is, whether the eastern line of the corporation extends to the middle thread of the Mississippi river, or is limited to the bank of the channel. The calls for boundary in the charter are, "beginning at Antoine Roy's mill on the bank of the Mississippi; thence running sixty arpens west; thence south on said line of sixty arpens in the rear, until the same comes to the Barrieu Donoyer; thence due south until it comes to the Sugar-loaf; thence due east to the Mississippi; from thence by the Mississippi, to the place first mentioned."

The expression used in designating boundary on the closing line in the charter is as apt to confer riparian rights on the \* proprietor of the tract of seventy-nine acres as the call [ \* 65 ] could well be, unless the last call had been for the middle of the river.

Many authorities resting on adjudged cases have been adduced to us in the printed argument presented by the counsel of the defendant in error, to show that from the days of Sir Matthew Hale to the present time all grants of land bounded by fresh-water rivers, where the expressions designating the water line are general, confer the proprietorship on the grantee to the middle thread of the stream, and entitle him to the accretion.

We think this as a general rule too well settled, as part of the American and English law of real property, to be open to discussion; and the inquiry here is, whether the rule applies to so great and public a water-course as the Mississippi is, at the city of St. Louis? The land grant to which the accretion attached has nothing peculiar in it to form an exemption from the rule; it is an irregular piece of land, of seventy-nine acres, found vacant by the surveyor general, and surveyed by him as a school lot, in conformity to the act of 1812.

The doctrine, that on rivers where the tide ebbs and flows, grants of land are bounded by ordinary high-water mark, has no application in this case; nor does the size of the river alter the rule. To hold that it did, would be a dangerous tampering with riparian

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rights, involving litigation concerning the size of rivers as matter of fact, rather than proceeding on established principles of law.

1. We are of the opinion that the city charter of St. Louis, of 1809, extends to the eastern boundary of the State of Missouri, in the middle of the river Mississippi. *Dovaston v. Payne*, 2 Smith's Leading Cases, 225.

2. That Duncan's entry set up in defense in the court below is void, as this court held in the case of *Kissell v. The St. Louis Schools*, 18 How.

3. That the school corporation held the land in dispute, with power to sell and convey the same in fee to the defendant in error, *Soulard*, in execution of their trust.

It is ordered that the judgment of the circuit court be affirmed.

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THE COMMONWEALTH OF KENTUCKY, v. WILLIAM DENNISON, Governor  
of the State of Ohio.

24 H. 66.

FUGITIVE SLAVE LAW—POWER OF THIS COURT TO COMPEL A GOVERNOR TO OBEY IT—  
MANDAMUS.

1. Where a rule, either at common law or in equity, issues from this court in the exercise of its original jurisdiction against a State, it should be served upon the governor or chief magistrate of the State, and upon its attorney general.
2. It is the well settled doctrine, that in modern practice *mandamus* is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ.
3. Nor does the exercise of the original jurisdiction of this court depend on the existence of acts of congress prescribing the mode in which it shall be done.
4. The clause of the federal constitution, which declares that any person charged with treason, felony, or other crime, in any State, who shall flee from justice and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime, was intended to include any offense made punishable by the law of the State in which it was committed.
5. The right which it gives to the executive authority of the one State to demand the fugitive from the executive authority of the other State is absolute, and so is the correlative obligation to deliver him up.
6. Congress, by the act of the 12th of February, 1793, provided the mode by which this constitutional provision should be carried into execution; and after describing the nature of the evidence to be produced to the executive of whom the demand is to be made, declares that it shall be his duty to cause the fugitive to be arrested and to be given up to the properly authorized agent of the State making the demand.
7. But these words, "It shall be the duty," &c, are not used in a mandatory sense, but are expressive merely of the moral obligation of the executive to obey the constitution of the United States on that subject.
8. Nor was it within the constitutional power of congress to impose this duty or to

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compel its performance by any officer of the State; the duty rests solely on the sense of honor and good faith of the States as declared by the constitution.

9. Hence, if the governor of any State refuses to discharge this duty, there is no power delegated to the general government, either through the judicial department or any department, to compel its performance.

THIS was an application to this court in the exercise of its original jurisdiction to compel the governor of the State of Ohio to deliver up Willis Lago, charged as a fugitive from justice in the State of Kentucky, where he was charged with aiding and assisting a slave to leave and escape from her owner. A notice having been by direction of the court served on the governor and attorney general of the State of Ohio, the latter appeared in response and denied the jurisdiction of the court to issue the writ.

*Mr. Cooper, Mr. Marshall, and Mr. Stevenson*, for the State of Kentucky.

*Mr. Wolcott*, for the governor of Ohio.

\*Mr. Chief Justice TANEY delivered the opinion of the [ \* 95 ] court.

The court is sensible of the importance of this case, and of the great interest and gravity of the questions involved in it, and which have been raised and fully argued at the bar.

Some of them, however, are not now for the first time brought to the attention of this court; and the objections made to the jurisdiction, and the form and nature of the process to \*be issued, and upon whom it is to be served, have all been [ \* 96 ] heretofore considered and decided, and cannot now be regarded as open to further dispute.

As early as 1792, in the case of *Georgia v. Brailsford*, the court exercised the original jurisdiction conferred by the constitution, without any further legislation by congress, to regulate it, than the act of 1789. And no question was then made, nor any doubt then expressed, as to the authority of the court. The same power was again exercised without objection in the case of *Oswald v. The State of Georgia*, in which the court regulated the form and nature of the process against the State, and directed it to be served on the governor and attorney general. But in the case of *Chisholm's Executors v. The State of Georgia*, at February term, 1793, reported in 2 Dall. 419, the authority of the court in this respect was questioned, and brought to its attention in the argument of counsel; and the report shows how carefully and thoroughly the subject was considered. Each of the judges delivered a separate opinion, in

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which these questions, as to the jurisdiction of the court, and the mode of exercising it, are elaborately examined.

Mr. Chief Justice Jay, Mr. Justice Cushing, Mr. Justice Wilson, and Mr. Justice Blair, decided in favor of the jurisdiction, and held that process served on the governor and attorney general was sufficient. Mr. Justice Iredell differed, and thought that further legislation by congress was necessary to give the jurisdiction, and regulate the manner in which it should be exercised. But the opinion of the majority of the court upon these points has always been since followed. And in the case of *New Jersey v. New York*, in 1831, 5 Pet. 284, Chief Justice Marshall, in delivering the opinion of the court, refers to the case of *Chisholm v. The State of Georgia*, and to the opinions then delivered, and the judgment pronounced, in terms of high respect, and after enumerating the various cases in which that decision had been acted on, reaffirms it in the following words:

“It has been settled by our predecessors, on great deliberation, that this court may exercise its original jurisdiction in [ \* 97 [ \*suits against a State, under the authority conferred by the constitution and existing acts of congress. The rule respecting the process, the persons on whom it is to be served, and the time of service, are fixed. The course of the court, on the failure of the State to appear after due service of process, has been also prescribed.”

And in the same case, page 289, he states in full the process which had been established by the court as a rule of practice in the case of *Grayson v. The State of Virginia*, 3 Dall. 320, and ever since followed. This rule directs “that when process at common law, or in equity, shall issue against a State, the same shall be served upon the governor or chief executive magistrate and the attorney general of such State.”

It is equally well settled, that a mandamus in modern practice is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. It undoubtedly came into use by virtue of the prerogative power of the English crown, and was subject to regulations and rules which have long since been disused. But the right to the writ, and the power to issue it, has ceased to depend upon any prerogative power, and it is now regarded as an ordinary process in cases to which it is applicable. It was so held by this court in the cases of *Kendall v. United States*, 12 Pet. 615; *Kendall v. Stokes* and others, 3 How. 100.

So, also, as to the process in the name of the governor, in his official capacity, in behalf of the State.

In the case of *Madraso v. The Governor of Georgia*, 1 Pet. 110. it was decided, that in a case where the chief magistrate of a State is sued, not by his name as an individual, but by his style of office, and the claim made upon him is entirely in his official character, the State itself may be considered a party on the record. This was a case where the State was the defendant; the practice, where it is plaintiff, has been frequently adopted of suing in the name of the governor in behalf of the State, and was indeed the form originally used, and always recognized as the suit of the State.

Thus, in the first case to be found in our reports, in which a suit was brought by a State, it was entitled, and set forth in \*the bill, as the suit of "the State of Georgia, [ \* 98 ] by Edward Tellfair, governor of the said State, complainant, against Samuel Brailsford and others;" and the second case, which was as early as 1793, was entitled and set forth in the pleadings as the suit of "His excellency Edward Tellfair, esquire, governor and commander-in-chief in and over the State of Georgia, in behalf of the said State, complainant, against Samuel Brailsford and others, defendants."

The cases referred to leave no question open to controversy, as to the jurisdiction of the court. They show that it has been the established doctrine upon this subject ever since the act of 1789, that in all cases where original jurisdiction is given by the constitution, this court has authority to exercise it without any further act of congress to regulate its process or confer jurisdiction, and that the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice. And that it has also been settled, that where the State is a party, plaintiff or defendant, the governor represents the State, and the suit may be, in form, a suit by him as governor in behalf of the State, where the State is plaintiff, and he must be summoned or notified as the officer representing the State, where the State is defendant. And further, that the writ of mandamus does not issue from or by any prerogative power, and is nothing more than the ordinary process of a court of justice, to which every one is entitled, where it is the appropriate process for asserting the right he claims.

We may therefore dismiss the question of jurisdiction without further comment, as it is very clear, that if the right claimed by Kentucky can be enforced by judicial process, the proceeding by *mandamus* is the only mode in which the object can be accomplished.

This brings us to the examination of the clause of the constitu-

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tion which has given rise to this controversy. It is in the following words:

“A person charged in any State with treason, felony, or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the [ \* 99 ] \*State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime.”

Looking to the language of the clause, it is difficult to comprehend how any doubt could have arisen as to its meaning and construction. The words, “treason, felony, or other crime,” in their plain and obvious import, as well as in their legal and technical sense, embrace every act forbidden and made punishable by a law of the State. The word “crime” of itself includes every offense, from the highest to the lowest in the grade of offenses, and includes what are called “misdemeanors,” as well as treason and felony.

4 Bl. Com. 5, 6, and note 3, Wendell’s edition.

But as the word crime would have included treason and felony, without specially mentioning those offenses, it seems to be supposed that the natural and legal import of the word, by associating it with those offenses, must be restricted and confined to offenses already known to the common law and to the usage of nations, and regarded as offenses in every civilized community, and that they do not extend to acts made offenses by local statutes growing out of local circumstances, nor to offenses against ordinary police regulations. This is one of the grounds upon which the governor of Ohio refused to deliver Lago, under the advice of the attorney general of that State.

But this inference is founded upon an obvious mistake as to the purposes for which the words “treason and felony” were introduced. They were introduced for the purpose of guarding against any restriction of the word “crime,” and to prevent this provision from being construed by the rules and usages of independent nations in compacts for delivering up fugitives from justice. According to these usages, even where they admitted the obligation to deliver the fugitive, persons who fled on account of political offenses were almost always excepted, and the nation upon which the demand is made also uniformly claims and exercises a discretion in weighing the evidence of the crime, and the character of the offense. The policy of different nations, in this respect, with the opinions of eminent writers upon public law, are collected [ \* 100 ] in Wheaton \*on the Law of Nations, 171; Fœlix, 312; and Martin, Vergè’s edition, 182. And the English govern-



ment, from which we have borrowed our general system of law and jurisprudence, has always refused to deliver up political offenders who had sought an asylum within its dominions. And as the States of this Union, although united as one nation for certain specified purposes, are yet, so far as concerns their internal government, separate sovereignties, independent of each other, it was obviously deemed necessary to show, by the terms used, that this compact was not to be regarded or construed as an ordinary treaty for extradition between nations altogether independent of each other, but was intended to embrace political offenses against the sovereignty of the State, as well as all other crimes. And as treason was also a "felony," (4 Bl. Com. 94,) it was necessary to insert those words, to show, in language that could not be mistaken, that political offenders were included in it. For this was not a compact of peace and comity between separate nations who had no claim on each other for mutual support, but a compact binding them to give aid and assistance to each other in executing their laws, and to support each other in preserving order and law within its confines, whenever such aid was needed and required; for it is manifest that the statesmen who framed the constitution were fully sensible, that from the complex character of the government, it must fail unless the States mutually supported each other and the general government; and that nothing would be more likely to disturb its peace, and end in discord, than permitting an offender against the laws of a State, by passing over a mathematical line which divides it from another, to defy its process, and stand ready, under the protection of the State, to repeat the offense as soon as another opportunity offered.

Indeed, the necessity of this policy of mutual support, in bringing offenders to justice, without any exception as to the character and nature of the crime, seems to have been first recognized and acted on by the American colonies; for we find by Winthrop's History of Massachusetts, vol. 2, pages 121 and 126, that as early as 1643, by "articles of \* confederation between [ \* 101 ] the plantations under the government of Massachusetts, the plantation under the government of New Plymouth, the plantations under the government of Connecticut and the government of New Haven, with the plantations in combination therewith," these plantations pledged themselves to each other that, upon the escape of any prisoner or fugitive for any criminal cause, whether by breaking prison, or getting from the officer, or otherwise escaping, upon the certificate of two magistrates of the jurisdiction out of which the escape was made that he was a prisoner or such an

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offender at the time of the escape, the magistrate, or some of them, of the jurisdiction where, for the present, the said prisoner or fugitive abideth, shall forthwith grant such a warrant as the case will bear, for the apprehending of any such person, and the delivery of him into the hands of the officer or other person who pursueth him; and if there be help required for the safe returning of any such offender, then it shall be granted unto him that craves the same, he paying the charges thereof." It will be seen that this agreement gave no discretion to the magistrate of the government where the offender was found; but he was bound to arrest and deliver, upon the production of the certificate under which he was demanded.

When the thirteen colonies formed a confederation for mutual support, a similar provision was introduced, most probably suggested by the advantages which the plantations had derived from their compact with one another. But, as these colonies had then, by the declaration of independence, become separate and independent sovereignties, against which treason might be committed, their compact is carefully worded, so as to include treason and felony—that is, political offenses—as well as crimes of an inferior grade. It is in the following words:

"If any person, guilty of or charged with treason, felony, or other high misdemeanor, in any State, shall flee from justice, and be found in any other of the United States, he shall, upon demand of the governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense."

[ \* 102 ] \* And when these colonies were about to form a still closer union by the present constitution, but yet preserving their sovereignty, they had learned from experience the necessity of this provision for the internal safety of each of them, and to promote concord and harmony among their members; and it is introduced in the constitution substantially in the same words, but substituting the word "crime" for the words "high misdemeanor," and thereby showing the deliberate purpose to include every offense known to the law of the State from which the party charged had fled.

The argument on behalf of the governor of Ohio, which insists upon excluding from this clause new offenses created by a statute of the State, and growing out of its local institutions, and which are not admitted to be offenses in the State where the fugitive is found, nor so regarded by the general usage of civilized nations, would render the clause useless for any practical purpose. For

where can the line of division be drawn with anything like certainty? Who is to mark it? The governor of the demanding State would probably draw one line, and the governor of the other State another. And, if they differed, who is to decide between them? Under such a vague and indefinite construction, the article would not be a bond of peace and union, but a constant source of controversy and irritating discussion. It would have been far better to omit it altogether, and to have left it to the comity of the States, and their own sense of their respective interests, than to have inserted it as conferring a right, and yet defining that right so loosely as to make it a never-failing subject of dispute and ill-will.

The clause in question, like the clause in the confederation, authorizes the demand to be made by the executive authority of the State where the crime was committed, but does not in so many words specify the officer of the State upon whom the demand is to be made, and whose duty it is to have the fugitive delivered and removed to the State having jurisdiction of the crime. But, under the confederation, it is plain that the demand was to be made on the governor or executive authority of the State, and could be made on no other department, \* or officer; for the con- [ \* 103 ] federation was only a league of separate sovereignties, in which each State, within its own limits, held and exercised all the powers of sovereignty; and the confederation had no officer, either executive, judicial, or ministerial, through whom it could exercise an authority within the limits of a State. In the present constitution, however, these powers, to a limited extent, have been conferred on the general government within the territories of the several States. But the part of the clause in relation to the mode of demanding and surrendering the fugitive is, (with the exception of an unimportant word or two,) a literal copy of the article of the confederation, and it is plain that the mode of the demand and the official authority by and to whom it was addressed, under the confederation, must have been in the minds of the members of the convention when this article was introduced, and that, in adopting the same words, they manifestly intended to sanction the mode of proceeding practiced under the confederation—that is, of demanding the fugitive from the executive authority, and making it his duty to cause him to be delivered up.

Looking, therefore, to the words of the constitution—to the obvious policy and necessity of this provision to preserve harmony between States, and order and law within their respective borders, and to its early adoption by the colonies, and then by the confed-

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*Commonwealth of Kentucky v. Dennison, Governor, &c.*

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erated States, whose mutual interest it was to give each other aid and support whenever it was needed—the conclusion is irresistible, that this compact engrafted in the constitution included, and was intended to include, every offense made punishable by the law of the State in which it was committed, and that it gives the right to the executive authority of the State to demand the fugitive from the executive authority of the State in which he is found; that the right given to “demand” implies that it is an absolute right; and it follows that there must be a correlative obligation to deliver, without any reference to the character of the crime charged, or to the policy or laws of the State to which the fugitive has fled.

This is evidently the construction put upon this article in [ \* 104 ] \* the act of congress of 1793, under which the proceedings now before us are instituted. It is therefore the construction put upon it almost contemporaneously with the commencement of the government itself, and when Washington was still at its head, and many of those who had assisted in framing it were members of the congress which enacted the law.

The constitution having established the right on one part and the obligation on the other, it became necessary to provide by law the mode of carrying it into execution. The governor of the State could not, upon a charge made before him, demand the fugitive; for, according to the principles upon which all of our institutions are founded, the executive department can act only in subordination to the judicial department, where rights of person or property are concerned, and its duty in those cases consists only in aiding to support the judicial process and enforcing its authority, when its interposition for that purpose becomes necessary, and is called for by the judicial department. The executive authority of the State, therefore, was not authorized by this article to make the demand unless the party was charged in the regular course of judicial proceedings. And it was equally necessary that the executive authority of the State upon which the demand was made, when called on to render his aid, should be satisfied by competent proof that the party was so charged. This proceeding, when duly authenticated, is his authority for arresting the offender.

This duty of providing by law the regulations necessary to carry this compact into execution, from the nature of the duty and the object in view, was manifestly devolved upon congress; for if it was left to the States, each State might require different proof to authenticate the judicial proceeding upon which the demand was founded; and as the duty of the governor of the State where the fugitive was found is, in such cases, merely ministerial, with-

out the right to exercise either executive or judicial discretion, he could not lawfully issue a warrant to arrest an individual without a law of the State or of congress to authorize it. These difficulties presented themselves as early as 1791, in a demand made by the governor \*of Pennsylvania upon the governor of [ \* 105 ] Virginia, and both of them admitted the propriety of bringing the subject before the President, who immediately submitted the matter to the consideration of congress. And this led to the act of 1793, of which we are now speaking. All difficulty as to the mode of authenticating the judicial proceeding was removed by the article in the constitution, which declares "that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings, of every other State; and the congress may by general laws prescribe the manner in which acts, records, and proceedings shall be proved, and the effect thereof." And without doubt the provision of which we are now speaking—that is, for the delivery of a fugitive, which requires official communications between States, and the authentication of official documents—was in the minds of the framers of the constitution, and had its influence in inducing them to give this power to congress. And acting upon this authority, and the clause of the constitution which is the subject of the present controversy, congress passed the act of 1793, February 12th, which, as far as relates to this subject, is in the following words:

"Section 1. That whenever the executive authority of any State in the Union, or of either of the territories northwest or south of the river Ohio, shall demand any person as a fugitive from justice of the executive authority of any such State or territory to which such person shall have fled, and shall, moreover, produce the copy of an indictment found, or an affidavit made before a magistrate of any State or territory as aforesaid, charging the person so demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or territory from whence the person so charged fled, it shall be the duty of the executive authority of the State or territory to which such person shall have fled to cause him or her to be arrested and secured, and notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear \*but [ \* 106 ] if no such agent shall appear within six months from the time of the arrest, the prisoner may be discharged. And all costs or expenses incurred in the apprehending, securing, and transmit-

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Commonwealth of Kentucky *v.* Dennison, Governor, &c.

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ting such fugitive to the State or territory making such demand shall be paid by such State or territory.

“Section 2. And be it further enacted, That any agent, appointed as aforesaid, who shall receive the fugitive into his custody, shall be empowered to transport him or her to the State or territory from which he or she shall have fled; and if any person or persons shall by force set at liberty or rescue the fugitive from such agent while transporting as aforesaid, the person or persons so offending shall, on conviction, be fined not exceeding five hundred dollars, and be imprisoned not exceeding one year.”

It will be observed, that the judicial acts which are necessary to authorize the demand are plainly specified in the act of congress; and the certificate of the executive authority is made conclusive as to their verity when presented to the executive of the State where the fugitive is found. He has no right to look behind them, or to question them, or to look into the character of the crime specified in this judicial proceeding. The duty which he is to perform is, as we have already said, merely ministerial—that is, to cause the party to be arrested, and delivered to the agent or authority of the State where the crime was committed. It is said in the argument, that the executive officer upon whom this demand is made must have a discretionary executive power, because he must inquire and decide who is the person demanded. But this certainly is not a discretionary duty upon which he is to exercise any judgment, but is a mere ministerial duty—that is, to do the act required to be done by him, and such as every marshal and sheriff must perform when process, either criminal or civil, is placed in his hands to be served on the person named in it. And it never has been supposed that this duty involved any discretionary power, or made him anything more than a mere ministerial officer; and such is the position and character of the executive of the State under this law, when the demand is made upon him and the requisite evidence produced. [\* 107] The governor has only to issue his warrant to an agent or officer to arrest the party named in the demand.

The question which remains to be examined is a grave and important one. When the demand was made, the proofs required by the act of 1793 to support it were exhibited to the governor of Ohio, duly certified and authenticated; and the objection made to the validity of the indictment is altogether untenable. Kentucky has an undoubted right to regulate the forms of pleading and process in her own courts, in criminal as well as civil cases, and is not bound to conform to those of any other State. And whether the

charge against Lago is legally and sufficiently laid in this indictment according to the laws of Kentucky, is a judicial question to be decided by the courts of the State, and not by the executive authority of the State of Ohio.

The demand being thus made, the act of congress declares, that "it shall be the duty of the executive authority of the State" to cause the fugitive to be arrested and secured, and delivered to the agent of the demanding State. The words, "it shall be the duty," in ordinary legislation, imply the assertion of the power to command and to coerce obedience. But looking to the subject-matter of this law, and the relations which the United States and the several States bear to each other, the court is of opinion, the words "it shall be the duty" were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the executive of the State; nor is there any clause or provision in the constitution which arms the government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights. And we think it clear, that the federal government, under the constitution, has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it \*possessed this power, it might over- [ \*108 ] load the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State.

It is true that congress may authorize a particular State officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced, or punished for his refusal. And we are very far from supposing, that in using this word "duty," the statesmen who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over State officers not warranted by the constitution. But the general government having in that law fulfilled the duty devolved upon it, by prescribing the proof and mode of authentication upon which the State authorities were bound to deliver the fugitive, the word "duty" in the law points to the obligation on the State to carry it into execution.

It is true that in the early days of the government, congress

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relied with confidence upon the co-operation and support of the States, when exercising the legitimate powers of the general government, and were accustomed to receive it, upon principles of comity, and from a sense of mutual and common interest, where no such duty was imposed by the constitution. And laws were passed authorizing State courts to entertain jurisdiction in proceedings by the United States to recover penalties and forfeitures incurred by breaches of their revenue laws, and giving to the State courts the same authority with the district courts of the United States to enforce such penalties and forfeitures, and also the power to hear the allegations of parties, and to take proofs, if an application for a remission of the penalty or forfeiture should be made, according to the provisions of the acts of congress. And these powers were for some years exercised by State tribunals, readily, and without objection, until in some of the States it was declined because it interfered with and retarded the performance of duties which properly

belonged to them, as State courts; and in other States, [ \* 109 ] doubts appear to have arisen as \*to the power of the courts, acting under the authority of the State, to inflict these penalties and forfeitures for offenses against the general government, unless especially authorized to do so by the State.

And in these cases the co-operation of the States was a matter of comity, which the several sovereignties extended to one another for their mutual benefit. It was not regarded by either party as an obligation imposed by the constitution. And the acts of congress conferring the jurisdiction merely give the power to the State tribunals, but do not purport to regard it as a duty, and they leave it to the States to exercise it or not, as might best comport with their own sense of justice, and their own interest and convenience.

But the language of the act of 1793 is very different. It does not purport to give authority to the State executive to arrest and deliver the fugitive, but requires it to be done, and the language of the law implies an absolute obligation which the State authority is bound to perform. And when it speaks of the duty of the governor, it evidently points to the duty imposed by the constitution in the clause we are now considering. The performance of this duty, however, is left to depend on the fidelity of the State executive to the compact entered into with the other States when it adopted the constitution of the United States, and became a member of the Union. It was so left by the constitution, and necessarily so left by the act of 1793.

And it would seem that when the constitution was framed, and when this law was passed, it was confidently believed that a sense



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of justice and of mutual interest would insure a faithful execution of this constitutional provision by the executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well being in their internal concerns, as well as members of the Union. Hence, the use of the words ordinarily employed when an undoubted obligation is required to be performed, "it shall be his duty."

But if the governor of Ohio refuses to discharge this duty, there is no power delegated to the general government, either \* through the judicial department or any other depart- [ \* 110 ] ment, to use any coercive means to compel him.

And upon this ground the motion for the *mandamus* must be overruled.

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THE HECTOR AND THE WISCONSIN.

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RUSSELL STURGIS, Appellant, v. HERMAN BOYER and others.

24 H. 110.

ADMIRALTY—COLLISION—TUG BOAT—TONNAGE, &c.

1. In a collision in the harbor of New York between a lighter managed by oars and a ship towed by a steam tug, the tug was held to be in fault, because it had no lookout, and changed its course so as to bring on the collision at a time when those in charge of the lighter could not prevent it.
2. As between the tug and the ship which she was towing, the tug is responsible, because it sufficiently appears that those in charge of the tow were in full control of both vessels, the ship having no crew and no control, or means of control, of the course and speed of the two vessels, or of either of them.

APPEAL from the circuit court for the southern district of New York. The case is fully stated in the opinion.

*Mr. C. A. Seward*, for the owner of the tug.

*Mr. Williams*, for owner of the ship Wisconsin.

*Mr. Benedict*, for the appellants, owners of the lighter.

\* Mr. Justice CLIFFORD delivered the opinion of the court. [ \* 117 ]

This is an appeal in admiralty from a decree of the circuit court of the United States for the southern district of New York, in a cause of collision, civil and maritime. It was a proceeding *in rem* against the ship Wisconsin and the steam tug Hector, and was instituted in the district court on the twenty-sixth day of October, 1855, by the owners of the lighter Republic. They allege in the

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libel, that the lighter, on the fifteenth day of October, 1855, started from pier six, in East river, in the port of New York, laden [ \* 118 ] with flour, which was \*in their possession as common carriers, to proceed up the river to the foot of Dover street, in the same port; that she had a competent crew on board, but that the wind being light, she was propelled exclusively by oars, and was moving through the water only at the rate of a mile an hour; that when she arrived at a point nearly opposite the place of her destination, she was headed towards the pier or wharf for which she started, and while in that position, that the ship Wisconsin, in tow of the steamboat Hector, and lashed to the starboard side of the tug, came down the river, and was so negligently managed that the flying jib-boom of the ship struck the lighter and capsized her, causing her cargo to roll into the water, and damaging the flour and the lighter to the amount of two thousand and one hundred dollars. Negligence, want of care and skill on the part of those in charge of the tow, are alleged to have been the cause of the collision; and the libellants also allege that the ship and steam tug were incompetently manned; that they had no proper look-out, and that those in charge of them disregarded the warnings of the lighter, and did not in due time stop and back the engine of the tug, or shear the tow so as to avoid the lighter, as they were bound to have done. Process was issued against the ship and the tug, and the claimants of the respective vessels subsequently appeared, and filed separate answers to the several allegations of the libel. Both answers affirm that the collision was occasioned through the fault of those in charge of the lighter; but in most other respects they are essentially variant. On the part of the steam tug, it is alleged that she was employed by the owners of the ship to tow her from the foot of Water street to the pier at the foot of Dover street; and that the tug was merely the motive power to move the ship to the pier, and that the tug and her crew were subject to, and obeyed the orders of, the master and other officers in charge of the ship. Wherefore, the claimant prays that, in case the libellants recover any sum against the ship and tug, he may have a decree against the ship and her owners for such proportion of the same as he may be made liable to pay. But the claimants of the ship allege that she was in the charge and under [ \* 119 ] the control and management of \*the master and crew of the steam tug. They admit in the answer that her mate, helmsman, and a full complement of mariners were on board, but aver that they were all under the direction and control of the master and officers of the steam tug to which she was lashed.

Testimony was taken on both sides, and after a full hearing in the district court, a decree was entered in favor of the libelants against the ship and the steam tug. From that decree the claimants of each of those vessels appealed to the circuit court, and the cause was there again heard upon the same testimony. After the hearing, the circuit court affirmed the decree of the district court against the tug, but dismissed the libel with costs as against the ship. Whereupon the claimants of the tug appealed to this court, and the libelants also appealed from so much of the decree as pronounced the ship not liable.

At the argument in this court, it was conceded that the flying jib-boom of the ship struck the peak halyards of the lighter, and capsized her, causing the cargo, which consisted of flour in barrels, to roll into the water, and no question was made that the damages had not been correctly estimated. According to the testimony in the case, the lighter was bound up the river, and she was propelled exclusively by oars or sweeps. Her course was on the northern side of the stream, some two hundred yards from the shore. She was moving about a mile an hour, and the collision occurred at mid-day, and in fair weather. As alleged in the pleadings, the ship was bound down the river, and she was securely lashed, in the usual manner, to the starboard side of the steam tug. Neither the ship nor tug had any proper look-out, and it clearly appears that those in charge of them did not see the lighter till it was too late to adopt the necessary precautions to prevent a collision. Their course down the river was about the same distance from the northern shore as that of the lighter, and both vessels were propelled by the steam-power of the tug. They were bound to a point alongside of another ship, lying at the end of pier twenty-seven, and the lighter was bound to pier twenty-eight, a short distance up the river. None of these facts are disputed, and the testimony clearly \*shows that the lighter first changed [ \* 120 ] her course, and headed towards the pier to which she was bound. When the lighter changed her course, and headed for the pier, the ship was so far distant that, if she had kept her course, the lighter would have passed to the pier in safety. Nothing appearing in the river to obstruct the view, those in charge of the lighter had a right to assume that she was seen by those navigating the approaching vessels, and that they would hold their course or keep out of the way. Propelled as they were by steam-power, those in charge of them could readily govern their course and control their movement. More difficulty, however, would have attended any such effort on the part of the lighter. It was then

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about slack high-water, the current still running up a little out in the stream; but the tide had commenced to ebb close in shore, so that the flour, after it rolled into the water, floated down the river. Until the lighter turned towards the pier, she had been aided in her course by the current; but, when she changed her course, and headed towards the pier, she was rather impeded than benefited by the tide. Those in charge of her saw the ship and tug approaching, and hailed those on board, apprising them of the danger of a collision. There were three men belonging to the lighter; two were forward at the oars, and one was aft, and it does not appear that they omitted anything in their power to do to avoid the disaster. On the other hand, it does appear that the descending vessels were without any lookout, and that those in charge of them did not see the lighter in season to adopt the necessary precautions to prevent the collision. Beyond question, it was the mate of the ship who first saw the lighter, and he admits that she was then heading square into the slip, and was using two oars. He had no charge of the ship, and it does not appear that he, in any manner, interfered with her navigation from the time she left her mooring until she reached her place of destination. When the hail was given from the lighter, he was employed in getting the lines ready to send ashore, as soon as the ship should arrive at the proper place. All of the orders were given by the master of the tug, which had been employed by the owners of the [ \* 121 ] ship to transport her \*from her moorings to pier twenty-seven, for the purpose of discharging what merchandise she had on board, and taking in another cargo. They had also employed a head stevedore to discharge her cargo, and reload her; and, in point of fact, all the men on board, except the mate, were the hands in the employment of the principal stevedore, not one of whom belonged to the crew of the ship. Her master was not on board, and contrary to the allegation of the answer, the testimony shows that she was without a crew. One of the stevedores was at the wheel of the ship, but both vessels were exclusively under the command and direction of the master of the tug. Prior to the collision, and when the pilot of the tug gave the signal to slow, the master of the tug left his own vessel and went on to the ship, and all the subsequent orders were given by him, while standing on the quarter-deck of the latter vessel. "My attention," says the mate of the ship, "was first called to the lighter by a hail from one of her men." He was the first person on the descending vessels who saw the lighter, and he at once gave notice to the master of the tug. They were then so near, that the mate says he anticipated

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a collision, and considering the headway of the ship, he was unable to see how it could be avoided. True it is, the master of the tug testifies that the ship had no headway at the time of the collision, but the weight of the testimony is greatly otherwise. No doubt is entertained that he gave the orders to stop and back before the collision occurred, but the circumstances clearly show that those orders were too late to have the desired effect.

Looking at all the facts and circumstances in the case, we think the libelants are clearly entitled to a decree in their favor; and the only remaining question of any importance is, whether the ship and the steam-tug are both liable for the consequences of the collision; or if not, which of the two ought to be held responsible for the damage sustained by the libelants. Cases arise, undoubtedly, when both the tow and the tug are jointly liable for the consequences of a collision; as when those in charge of the respective vessels jointly participate in their control and management, and the master or \*crew of both vessels are either deficient in [\* 122] skill, omit to take due care, or are guilty of negligence in their navigation. Other cases may well be imagined when the tow alone would be responsible; as when the tug is employed by the master or owners of the tow as the mere motive power to propel their vessels from one point to another, and both vessels are exclusively under the control, direction, and management of the master and crew of the tow. Fault in that state of the case cannot be imputed to the tug, provided she was properly equipped and seaworthy for the business in which she was engaged; and if she was the property of third persons, her owners cannot be held responsible for the want of skill, negligence, or mismanagement of the master and crew of the other vessel, for the reason that they are not the agents of the owners of the tug, and her owners in the case supposed do not sustain towards those intrusted with the navigation of the vessel the relation of the principal. But whenever the tug, under the charge of her own master and crew, and in the usual and ordinary course of such an employment, undertakes to transport another vessel, which, for the time being, has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary or usually employed, she must be held responsible for the proper navigation of both vessels; and third persons suffering damage through the fault of those in charge of the vessels must, under such circumstances, look to the tug, her master or owners, for the recompense which they are entitled to claim for any injuries that vessels or cargo may receive by such means. Assuming that the tug is a suitable vessel, properly

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manned and equipped for the undertaking, so that no degree of negligence can attach to the owners of the tow, on the ground that the motive power employed by them was in an unseaworthy condition, and the tow, under the circumstances supposed, is no more responsible for the consequences of a collision than so much freight; and it is not perceived that it can make any difference in that behalf, that a part, or even the whole of the officers and crew of the tow are on board, provided it clearly appears that the tug [ \* 123 ] was a seaworthy \* vessel, properly manned and equipped for the enterprise, and from the nature of the undertaking, and the usual course of conducting it, the master and crew of the tow were not expected to participate in the navigation of the vessel, and were not guilty of any negligence or omission of duty by refraining from such participation. Vessels engaged in commerce are held liable for damage occasioned by collision, on account of the complicity, direct or indirect, of their owners, or the negligence, want of care, or skill, on the part of those employed in their navigation. Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the management of the vessel. Whenever, therefore, a culpable fault is committed, whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as much liable for the consequences as if it had been committed by the owner himself. No such consequences follow, however, when the person committing the fault does not, in fact, or by implication of law, stand in the relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel in some way sustain towards each other the relation of principal and agent, the injured party cannot have this remedy against the colliding vessel. By employing a tug to transport their vessel from one point to another, the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service. They neither appoint the master of the tug, or ship the crew; nor can they displace either the one or the other. Their contract for the service, even though it was negotiated with the master, is, in legal contemplation, made with the owners of the vessel, and the master of the tug, notwithstanding the contract was negotiated with him, continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation. *Sproul v. Hemmingway*, 14 Pick. 1; 1 Pars. Mar. L. 208. *The Brig James Gray v. The John Frazer et al.* 21 How. 184.

Very nice questions may, and often do arise, says Judge Story, as to the person who, in the sense of the rule, is to be deemed

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the principal or employer in particular cases. Story \*on [ \* 124 ] Agency, sec. 443 *a*, p. 557. Where the owner of a carriage hired of a stable-keeper a pair of horses for a day, furnishing his own carriage, and the stable-keeper provided the driver, through whose negligent driving an injury was done to the horse of a third person, the judges of the King's Bench were equally divided upon the question, whether the owner of the carriage or the owner of the horses was liable for the injury. *Laugher v. Pointer*, 5 Barn. and Cress. 547. But the better opinion maintained by the more recent authorities is, that the driver should be regarded as the servant of the stable-keeper, and inasmuch as he could not at the same time be properly deemed the servant of both parties, that the stable-keeper, and not the temporary hirer, was responsible for his negligence. Upon the like ground, says the same commentator, the hirer of a wherry, to go from one place to another, would not be responsible for the waterman; nor the owner of a ship, chartered for a voyage on the ocean, for the misconduct of the crew employed by the charterer, provided the terms of the charter-party were such as constituted the charterer the owner for the voyage. *Quarman v. Burnett*, 6 Mee. and Wels. 499; *Randleson v. Murray*, 8 Adol. and Ellis, 109; *Milligan v. Wedge*, 12 Adol. and Ellis, 737; *The Express*, 1 Blatch. C. C. 365. Whether the party charged ought to be held liable, is made to depend in all cases of this description upon his relation to the wrong-doer. If the wrongful act was done by himself, or was occasioned by his negligence, of course he is liable; and he is equally so, if it was done by one towards whom he bore the relation of principal; but liability ceases where the relation itself entirely ceases to exist, unless the wrongful act was performed or occasioned by the party charged. It was upon this principle that the ship was held not liable in the case of the *John Frazer*, 21 How. 194. In that case, this court said, the mere fact that one vessel strikes and damages another does not, of itself, make her liable for the injury, but the collision must, in some degree be occasioned by her fault. A vessel properly secured may, by the violence of a storm, be driven from her moorings and forced against another vessel in spite of her efforts to avoid it, and yet she certainly would \*not be liable for damages [ \* 125 ] which it was not in her power to prevent. So, also, ships at sea, from storms or darkness of the weather, may come in collision with one another without fault on either side, and in that case each must bear its own loss, although one is much more damaged than the other. *Stainback et al. v. Rae et al.* 14 How. 532. Applying these principles to the present case, it is obvious what

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the result must be. Without repeating the testimony, it will be sufficient to say, that it clearly appears in this case that those in charge of the steam tug had the exclusive control, direction, and management, of both vessels, and there is not a word of proof in the record, either that the tug was not a suitable vessel to perform the service for which she was employed, or that any one belonging to the ship either participated in the navigation, or was guilty of any degree of negligence whatever in the premises.

Counsel on both sides stated, at the argument, that they were prepared to discuss a question of jurisdiction supposed to be involved in the record; but upon its being suggested by the court that the question was not raised either by the evidence, or in the pleadings, the point was abandoned. In view of the whole case, we think the decision of the circuit court was correct, and the decree is accordingly affirmed, with costs.

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JOSEPH C. PALMER and others, Appellants, v. THE UNITED STATES.

24 H. 125.

## CALIFORNIA LAND GRANTS.

1. Where the only archive evidence of a grant are the petition, the reference for information, and report, and the existence of an actual grant is, from all the circumstances, improbable, the claim will be rejected.
2. The evidence examined in this case shows that the grant relied on was never signed by the officers of the department at all, or, if signed, it was after they were overthrown by the Americans, and had ceased to have authority to make grants of land.

APPEAL from the district court for the northern district of California. The facts are stated in the opinion.

*Mr. Benjamin*, for appellants.

*Mr. Black*, attorney general, for the United States.

[ \* 126 ] \* Mr. Justice GRIER delivered the opinion of the court.

The appellants claim the land in dispute as assignees of Benito Diaz. This claim was rejected by the board of land commissioners, and also by the district court.

The documentary evidence, upon which the case rests, is as follows:

1. A petition of Benito Diaz, dated April 3, 1845, in which he asks for a grant of land which he calls "a vacant place within the jurisdiction of San Francisco, known by the name of 'Punta de



Lobos,' bounded on the north by the sea, which flows to the port of San Francisco; on the south with the Cerro, in the rear of the mission known by the name of the 'Cerro de Laguna Honda;' on the east with the 'Loma Alta;' and on the west by 'la Punta de Lobos;' which will comprehend two leagues." The petition adds that the presidio and castle are within the tract, but the petitioner does not ask for them unless the government is willing; but if that be done, he promises to *erect a house of certain dimensions in the port of San Francisco for the military command.*

2. An order of reference, bearing date May 24, 1845, and signed Pico, ordering the petition to pass for information to the respective judge, *and await the report of the military commander upon the matter.*

3. A report from Jose de la Cruz Sanches, who seems to have been alcalde at the pueblo of San Francisco, dated August 16, 1845, in which he declares that the land is vacant, and the petitioner has the necessary requisites according to law, *but declining to give any information about the military lands.*

4. A report by Francisco Sanches, the military commander, *dated at the military command of San Francisco*, October, 18, 1845, setting forth that the land the petitioner solicits is vacant and \* may be conceded to him, "*not comprehending in the* [\* 127] *grant the two military points of the castle and presidio that are included in the petition.*"

These documents are all written on the same paper. The governor's order of reference is on the margin, and the reports endorsed. But there is no concession or order that a definitive title should issue to the petitioner, as is always found when the governor accedes to the prayer of the petition. (See *Arguello v. United States*, 18 Howard, 543.)

The petition is not accompanied by a *diseño* or map of the land, as required by the regulations of 1828. This is all the document found among the archives or public records, and shows this fact only: that the petitioner asked for land; that the informè did not satisfy the governor, who did not accede to the request, and therefore the petitioner took nothing by his application. That the governor had good reasons for refusing the prayer of this petition, is apparent from the fact, not only of the public fortifications of the harbor being erected thereon, but because on the 4th of November, 1834, Governor Figueroa, in his decree establishing the pueblo of San Francisco, had included a large portion of the land now claimed, and the remainder was claimed as the land of the Mission Dolores, which the departmental assembly afterwards (15th

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April, 1846) ordered to be sold at auction, and suspended the further alienation of the same as vacant.

This is all the record evidence, on which alone the court can rely as speaking the truth. It does not show even an inchoate equity in Benito Diaz; nor does the fact that he carried off some of the materials of the dilapidated fort to build him a house in San Francisco add to it.

The next fact which we can admit as sufficiently proved is, the sale by Benito Diaz of the land claimed to Thomas O. Larkin, in September, 1846, reciting a grant or patent to Diaz, dated 25th of June, 1846. This instrument purports to be a patent or definitive title to Benito Diaz, for all the land included in the boundaries mentioned in the petition. The public fortifications which protect the harbor of San Francisco are not excepted. The value [ \* 128 ] of such a grant might easily be \*anticipated, when the occupation of the country by the United States had taken place. Pio Pico, after his deposition from the government, could afford to be more liberal in 1846 than in 1845, when he very properly refused to make it. There is no trace of this grant to be found on record, or in the public archives. It purports to be signed by Pio Pico, and attested by his secretary, Moreno; and each of them has been called to attest the genuineness of the signatures. We have decided in the case of *Luco v. United States*, (23 How. 543,) "that, owing to the weakness of memory with regard to the *dates* of grants signed by them, the testimony of the late officers of the Mexican government in California cannot be received to supply or contradict the public records, or establish a title of which there is no trace to be found in the public archives. In compliance with this rule, we might dismiss this case without further argument; for if the testimony of the officers of the government cannot be relied on, much less can that of more obscure individuals, especially as we have seen in the *Luco* case, and some others, that it is easy to obtain any number of witnesses to depose to any fact necessary to establish a fraudulent grant.

The testimony brought in this case to support this private deed, and give it the force and effect of a public record, grant, or patent, and to prove that it was executed as such before the 7th of July, 1846, when the official functions of the late officers ceased entirely, tends only to confirm the suspicions in which it is involved, and demonstrate the necessity of the rule of decision which we have adopted.

Pio Pico was called as a witness. He swears "that he *believes* the signature to be genuine," and that is all. He does not state

where it was signed, or when it was signed, whether before or after his expulsion from the government. If executed where it purports to be, viz: at Los Angeles, where the public records were kept, he knew it could be proved he had left Los Angeles a week before its date, (25th June,) and was residing at Santa Barbara, where he remained until the approach of Fremont to Monterey. He knew it could be proved that his secretary, who attested the paper, was in Los Angeles, \*seventy miles distant. He [ \* 129 ] could probably give no better reason for his willingness to sell the public forts, which he had refused to do a year before, than the fact that the Americans had taken possession of them. His silence on these points is expressive. There is no doubt that his testimony, so far as it goes, is true, and given with his habitual caution. He might excuse himself for not stating whether or not this grant was one of the large number said to have been executed by him on the 8th of August, on the eve of his departure to Mexico, for the reason that no question was asked him as to that fact.

Moreno, the secretary, is not so cautious, and therefore has involved himself in more difficulties, which are unexplained, and perhaps inexplicable.

He testifies as follows:

"I recollect this document. I saw it on the 25th June, 1846, when I signed it. This is my signature as secretary *ad interim*, and also my signature to the certificate of registry; and I saw Pio Pico sign it as governor. This is his genuine signature. I think Benito Diaz wrote the body of the grant himself. After the grant was completed, I delivered it to the agent of Benito Diaz, on the road from Los Angeles to Santa Barbara. The agent to whom I delivered it, according to my recollection, was Eulogio Celiz."

Now this document states that it was "given in the city of Los Angeles, on the 25th of June, 1846," and Moreno swears he saw Pio Pico sign it, who was on that day seventy miles distant in Santa Barbara. His certificate, that he has recorded it in the proper book, he does not prove to be true; or if he was at Santa Barbara, with Pico, on the 25th, how he could record it in Los Angeles, where alone the records were kept. If he executed and recorded it in Los Angeles, he does not explain why it is in the handwriting of Benito Diaz, and not drawn up by the clerks of the department as other grants; and how it came to pass that the date of the paper, and his certificate, are in the handwriting of Benito Diaz, who was at San Francisco, some five hundred and twenty miles distant; nor how it came to pass, that when he had signed

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and recorded this important document, he put it in his [ \* 130 ] pocket, and started \* for Santa Barbara, and met Celiz on the road; nor does he explain how Celiz, who left San Francisco on the 21st of June, with this paper drawn up by Diaz, for the purpose of taking it to Los Angeles to have it executed, could have taken it all the way to Los Angeles, five hundred and twenty miles, before it was executed: and then, that Moreno should meet him on the road between Santa Barbara and Los Angeles, *after* it was executed. There were no railroads in California at that time by which to account for such swift traveling.

Diaz testifies that the document is in his handwriting; "that he wrote it in San Francisco, on the 20th or 21st of June, in consequence of a letter which he received from Bandini, whom he calls secretary of the government," but who was *not* secretary. "That the country was in such a *critical state*, that it was necessary to send it immediately; which he did, by special courier. That from information of his courier, Celiz, he understood that the grant was signed *on the road*, either at Santa Buena Ventura, or Santa Barbara." The critical state of the country, as the Americans were in possession of the greater part of it, will no doubt account for the fast riding of the courier, and in some measure for the execution of the deed on the highway, and the false certificate of record of a document which without such recording, was but a private deed.

If Celiz met Pico where he states, he required but five days to ride five hundred miles, while it required eight days for Pico to travel less than seventy miles.

There is no necessity to rely upon the testimony of witnesses Crane and Watson, that Diaz declared "that after the American revolution, he made out the grant in his own handwriting; and that, in order to make it valid, he dated it back to the month of June."

The face of the paper, and the testimony brought to support it, sufficiently demonstrate this to be the fact.

It is evident, that when this grant was fabricated, it was not known that conclusive evidence could be produced of the absence of Governor Pico from Los Angeles on the day of its [ \* 131 ] \* date. Hence the necessity of changing the venue to that of the highway, when it was too late to alter or erase the certificate of record to suit it. And hence the absurd contradictions exhibited in the testimony of Moreno. who appears to be emulating the example of his predecessor.

The judgment of the district court is therefore affirmed with costs.

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THE UNITED STATES, Appellants, v. CLAUDE CHANA and others.

24 H. 131.

CALIFORNIA LAND GRANTS.

THESE cases are disposed of on the authority of *United States v. Nye*, 21 How. 408, (3 Miller, 62,) and *United States v. Rose*, 23 How. 262, (3 Miller, 526.)

*Mr. Black*, attorney general, for the United States.

No counsel for appellees.

Mr. Justice CAMPBELL delivered the opinion of the court.

The appellees presented their claim before the board of commissioners for the settlement of land claims in California for a tract of land, consisting of four leagues, on the south side of Bear creek, in Yuba county, under a grant to Theodore Sicard by Micheltorena, governor of the department of California.

The testimony to sustain the claim is similar to that offered in the cases of *United States v. Nye*, 21 How. 408, and *United States v. Rose*, 23 How. 262. In these cases it was determined that the testimony was not sufficient to support the \*claims. [ \* 132 ] This case must follow the same course that was assumed in those.

Judgment of the district court reversed, and petition dismissed.

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WILLIAM A. HALL, Plaintiff in Error, v. JOSEPH L. PAPIN.

24 H. 132.

PEORIA LOTS—EFFECT OF SURVEY AND OF PATENT.

1. Where a claim under the act of 1820, confirmed by the act of 1823, (3 U. S. Statutes 786,) had not been surveyed, or the survey confirmed until 1841, and the defendant claimed under a patent from the United States of March 18, 1837, the court should have instructed the jury that a survey and its approval, made after the issue of the patent to other parties, would not relate back to the act of 1823, and make a perfect title, to the exclusion of the title under the patent.
2. That under the provisions of the act of 1823 no person could hold more than ten acres confirmed and surveyed to him; and where proof was offered to show that the plaintiffs claimed more than one lot, they should have been limited to one claim, and no more.

WRIT of error to the circuit court for the northern district of Illinois. The case is well stated in the opinion.

*Mr. Browning*, for plaintiff in error.

*Mr. Merriman* and *Mr. Blair*, for defendant.

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[ \* 138 ] \* Mr. Justice WAYNE delivered the opinion of the court.

This is a suit for the recovery of ten acres of land,  
[ \* 139 ] which is \* admitted by the parties to be a part of the northwest quarter of section three, in township eight north, of range eight east, of the fourth principal meridian, in the district of lands subject to sale formerly at Springfield, Illinois, and afterwards at Quincy.

Upon the trial below, the plaintiff gave in evidence: 1st, the act of Congress of May 15, 1820, entitled, an act for the relief of the inhabitants of the village of Peoria, in the State of Illinois; 2d, the act of the 3d March, 1823; 3d, the report of Edward Coles, in the 3d vol. State Papers, page 421; 4th, the special and general plat and field-notes of the survey of the village, made May 11, 1837, approved September 1, 1841, and approved by the surveyor of public lands in Illinois and Missouri; 5th, the deed of lot 13 by Bartholomew Fortier and his wife, Angelica, to plaintiff, September 23, 1854; 6th, depositions showing that Angelica was the only representative of Francis Willette, and that, when she made her claim before J. W. Coles, she was the wife of Louis Pilette, and that she married Fortier in 1838.

The defendant below, here the plaintiff in error, introduced in evidence a patent from the United States to Seth and Josiah Fulton, dated March 18, 1837, a pre-emption certificate of the same, laid July 11, 1833, and a conveyance by the Fultons to him of the land covered by the patent dated the 11th July, 1838. The patentees, Seth and Josiah Fulton, had lived upon the quarter section for several years before their entry was made, and Hall, also, had occupied the quarter section for some years before the Fultons sold to him. Also, a patent from the United States to the representatives of Francis Willette, for a lot which had been claimed by them under the act of the 3d March, 1823, and sundry depositions, which it is not necessary for us to notice in this opinion.

The defendant in error, Joseph L. Papin, claims the ten acres sued for in virtue of his purchase from Bartholomew Fortier, and Angelica, his wife, she being the sole representative of her father, and had claimed the land under the act of congress of the 15th May, 1820, 3 Stat. at Large, 605, and that of the 3d March, 1823, U. S. Stat. at Large, 786.

[ \* 140 ] \* The first of these acts declares, that " every person, or the legal representatives of any person, who claims a lot or lots in the village of Peoria, in the State of Illinois, shall, on or before the first day of November next, deliver to the register of the land office for the district of Edwardsville a notice in writing of his or her

claim, and it shall be the duty of the register to make to the secretary of the treasury a report of all claims filed with him, with the substance of the evidence in support thereof; and also his opinion, and such remarks respecting the claim as he may think proper to make; which report, with a list of the claims which, in the opinion of the register, ought to be confirmed, shall be laid by the secretary of the treasury before congress for their determination."

Under this act claims were made by Louis Pilette in right of his wife, Angelica, the daughter of Francis Willette, and they appear in the register's report, dated the 10th November, 1820, entered as numbers 11, 12, and 13. That report, however, was not finally acted upon by congress until the 3d March, 1823. The first section of that act declares, "there is hereby granted to each of the French and Canadian inhabitants, and other settlers in the village of Peoria, in the State of Illinois, whose claims are contained in a report made by the register of the land office at Edwardsville, in pursuance of the act of congress approved May 15, 1820, and who had settled a lot in the village aforesaid prior to the first day of January, 1813, and who have not heretofore received a confirmatory claim or donation of any tract of land or village lot from the United States, *the lot so settled upon and improved*, where the same shall not exceed two acres; and where the same shall exceed two acres, every such claimant shall be confirmed in a quantity not exceeding ten acres: Provided, nothing in this act contained shall be so construed as to affect the right, if any such there be, of any other person or persons to the said lots, or any part of them, derived from the United States, or any other source whatever, or be construed as a pledge on the part of the United States to make good any deficiency occasioned by any other interfering claim or claims." And it was made the duty of the surveyor of the public lands of the United States \*for that district [\* 141] to cause a survey to be made of the several lots, and to designate in a plat thereof the lots confirmed and set apart to each claimant, and forward the same to the secretary of the treasury, who shall cause patents to be issued in favor of such claimants, as in other cases.

The land sued for is described in the declaration as an out-lot or field of ten acres, near the *old village of Peoria*, in the State of Illinois, *confirmed* to Louis Pilette in right of his wife, Angelica, the daughter of the late Francis Willette, by the act of congress of the 3d March, 1823, entitled "An act to confirm certain lots in the village of Peoria, it being claim No. 13 of the report made by the register of the land office at Edwardsville, in pursuance of

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congress of the 15th May, 1820." The lot is claimed in the report of the register as an out-lot or field, containing fifteen or twenty arpents of land, situated three-fourths of a mile northeastwardly (northwestwardly) from the village of Peoria. There can be no uncertainty whether the old or new village was meant, as the survey establishes it to have been near the old; and in our consideration of the act of the 3d March, 1823, our conclusion is, that that act can only embrace lots in the new village, or others appertaining to it.

The old village of Peoria was situated on the northwest shore of Lake Peoria, about one mile and a half above the lower extremity or outlet of the lake. The village had been established by Frenchmen at an early date, previous to the recollection of any one. About the years 1778, 1779, the first house was built on what was then called *La Ville de Maillet*, afterwards the new village of Peoria, and afterwards known by the name of Fort Clark. It was situated about one mile and a half below the old village, immediately at the lower front or outlet of the lake. This situation was preferred on account of the water being better and the place more healthy than at the old village. In consequence, the inhabitants gradually deserted the old village, and before the years 1796, 1797, had entirely abandoned it, and removed to the new village.

The inhabitants were generally Indian traders, hunters, and voyagers. They formed a link of connection between the [\* 142] \* French residing on the waters of the great lakes and the Mississippi river. From that happy facility of adapting themselves to their situation and associates for which the French are so remarkable, the inhabitants of Peoria generally lived in harmony with their savage neighbors. But about the year 1781, an apprehension of Indian hostilities induced them to abandon the new village. They returned to it, however, after the peace of 1783, between England and the United States and the powers which had engaged in our revolutionary war, and continued there until the autumn of the year 1812. Then they were forcibly removed from it and their village destroyed by a Captain Craig, of the Illinois militia, on the ground, it was said, that himself and his company had been fired upon in the night by Indians, while at anchor in their boats before the village, with whom Craig suspected the villagers to be on too intimate and friendly terms. Craig and his company were in the service of the United States. The inhabitants of Peoria settled there without any grant or permission from any government. Each person took such a portion of unoccupied land as he wished to occupy and cultivate; but as soon as he abandoned



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it, his right to the land ceased with his possession, and it reverted to its natural state. It was then liable to be improved and cultivated by any one who thought proper to take possession. Sometimes a settler sold out his improvements before abandoning. That and the itinerant character of the inhabitants account for the number of persons who claimed the same lot. As was usual in French villages, the lots in the village were small. They were large enough for houses, out-houses, and gardens, and in some instances, those who were able to do so cultivated what were known as out-lots or fields near to, but outside or beyond, the village. Those out-fields were of different sizes, depending upon the industry and means of persons to till them. The village lots, as contradistinguished from out-lots, contained generally the half of an arpent. Neither the old nor new village had ever been surveyed or occupied upon any fixed plan. Seventy claims were made under the act of the 15th May, 1820. They were returned on the report of the register \* to the secretary of the treasury, on the [\* 143] 10th of November, 1820. In a little less than three years the act of 1823 was passed. Coles's Report, 3 Am. State Papers, Land.

The narrative just given has an important bearing upon the construction of the acts of 1820 and 1823. It serves to show the locality of the village of Peoria, for which those acts were passed, the purposes to be accomplished, and the extent and conditions upon which a lot may be confirmed to a claimant who had *settled and improved a lot* in the village before the first day of January, 1813, and who had not before received a confirmation of claims, or donation of any tract of land or village lot from the United States, when the lot settled upon and improved did not exceed two acres; and when it did, to confirm to the claimant ten acres, subject to the proviso in the act.

It was a gratuity to such settlers of a single lot in the village. Such was the first section of the act of 3d March, 1823. It gave to the claimant an incipient or inchoate right to a lot, when in conformity with the second section of the act, a survey had been made of the several lots reported by the register, *with a designation or a plat thereof of the lot confirmed and set apart to each claimant*. When that had been done, the claimant became a confirmee under the act, and his right to the lot, as between himself and the United States, was complete. Such was the view taken by this court of the acts of 15th May, 1820, and of the 3d March, 1823, in Bryan and Forsyth, 19 Howard, 336. Its language then was, when the survey was made, and the plats returned and approved and re-

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corded by the surveyor general of Illinois and Missouri, and recognized as valid at the general land office, it bound the parties to it, the confirmee and the United States.

The law was intended to grant the lot settled upon and improved, and no other land described as an equivalent. But, in this instance, no survey was made in conformity with the 2d section of the act until the 11th April, 1837. It was not examined and approved by the surveyor of the public lands in Illinois and Missouri until the first September, 1840, seven years after Seth and Josiah

Fulton had made their entry upon the quarter section, and [ \* 144 ] three years after they had received \* their patent for it from the United States. The land was unconditionally sold to them. Hall, the plaintiff in error, bought from the Fultons in July, 1838. Under the decision of this court, already cited, no location of the out-lots could be made upon this quarter section after the patent had been issued to the Fultons. It follows, then, that there was no confirmation of the land sued for to the representative of Francis Willette; and, consequently, that the quit-claim conveyance by Angelica Fortier and her husband, of the 23d September, 1854, to Papin, the defendant in error, gave to her no title to the ten acres for which he has sued. We have shown that the inchoate right of the claimant under the act—supposing that no out-lot was meant to be confirmed—was subject to a survey and designation before it could be matured into a title. The requirement of a survey, before a claimant could be considered as having a legal title to land upon a concession, has frequently been passed upon by this court; and the case before us is within that of *Menard Heirs v. Massey*, in 8 Howard, 309.

It now remains for us to consider two of the instructions which were asked by the defendant in the court below, which the court refused to give to the jury.

They were: If the jury believed from the evidence that the original French settlement or improvement, upon which the plaintiff's claim in this suit is based, was not upon or within the northwest quarter of section 3, in township eight north, in range eight east, of the fourth meridian, *nor located upon that quarter section by the United States surveyor until after that was sold to the Fultons by the United States, that the jury were to find for the defendant.*

The court did not give the first branch of the instructions asked and, in our opinion, rightly so; for there was no proof in the case to show that the French settlement, which was the basis of the suit, was not a part of it. Indeed, no such instruction would have been asked; for it was admitted by the parties that the tract sued

for was a part of the quarter section described in the patent to the Fultons. But the court refused, also, the second branch of the prayer, which, in our opinion, \*should have been [ \* 145 ] given, and gave the jury an instruction as follows: He told the jury that the acts of Congress of 1820 and 1823, taken in connection with the report of the register of the land office and the survey under the authority of law, vested in the parties entitled, under the acts of congress, with an absolute right of property in the lot surveyed; and that Angelica, the person named in the evidence, was the daughter and sole heir of her father, Francis Willette, the settler; that she was within the meaning of the law; and her claim being in the report, was confirmed by the act of 1823.

And the jury was further instructed, that the survey of the claimed lots, as reported by the register, was duly made and approved, because the survey for the purposes of this action made the title of the claimants under the acts of congress complete; and that the court was of the opinion that the persons taking under the patent of March 18th, 1837, and under the entry of July 11th, 1833, must be considered as taking their grant subject to the contingency of the better title which might thereafter be perfected under the acts of 1820 and 1823; and when a party brought himself within those acts, his title was the paramount title, *notwithstanding the patent to the Fultons*.

The defendant, in our view, had asked for such an instruction as he had a right to have under the authorities cited in a previous part of this opinion. The instruction given to the jury was erroneous.

The defendant had also asked in his second prayer, that the court would instruct the jury, if they believed from the evidence that by the plaintiff's recovering in this case the legal representatives of Willette would be confirmed in more than ten acres of Peoria French claims, that they were to find for the defendant. The prayer is inartificially drawn; but when taken in connection with the evidence in the case and the act of 1823, its purport could not have been misunderstood. The object of the defendant was to get an instruction from the court, upon the evidence he had given, in conformity with the limitation in the act, as to the quantity of land which could be confirmed to a claimant under it. It declares when the lot shall not exceed two acres, that it shall be confirmed; and \*when the same shall exceed two acres [ \* 146 ] that every such claimant shall be confirmed in a quantity not exceeding ten acres.

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Pilette, the husband of Angelica, had filed in her behalf, in the year 1820, before the register, claims for lots eleven, twelve, and thirteen. The first, being the land numbered as number eleven, contained about one-half of an arpent of land; number twelve the same quantity, situated directly in the rear of eleven, and separated from it by a street; number thirteen was a claim for an outlot or field, containing fifteen or twenty acres of land, and situated about three-fourths of a mile northeastwardly (northwestwardly) from the village of Peoria; number eleven was also claimed before the register by Felix Fontain, his claim being in the report No. 41; but it turned out, according to the survey, that both were for the same land, and that they covered the southwest part of Etienne Barnard's claim No. 1, the northeast part of it being also covered by another claim of Felix Fontain, numbered in the survey as 42. For land so described, containing fifty-four thousand eight hundred and ninety and fourteen-hundredths of a square foot, designated as covered by the claims one, eleven, forty-one, and forty-two, a patent was issued by the United States to the representatives of Francis Willette, on the 28th August, 1845. That patent was introduced in evidence by the defendant below, the plaintiff in error. The purpose was to show that the heirs of Willette having already had one confirmation of "a lot *settled and improved*," under the act of 3d March, 1823, that they were not entitled to another, or to any confirmation of the title to the land in litigation. If that were allowed, they would get more than the ten acres, to which every claimant was limited by the act. Our construction of the act is, that a claimant was to have one confirmation of "a lot so settled and improved," which had been claimed and entered in the report of the register of the land office at Edwardsville, in pursuance of the act of the 15th May, 1820; that no claimant, though he shall appear in the register's report as having made several claims, could, after having had one of them confirmed, transfer any right of property in the others to any persons whatever.

[ \* 147 ] \* Papin, the plaintiff below, took from the representatives of Willette a quit-claim conveyance for the land for which he sues on the 23d September, 1854—more than thirty years after the passage of the act of the 3d March, 1823—more than twenty years after the Fultons had made their entry upon the quarter section—eighteen years after they received their patent for it from the United States—seventeen after Hall had the land in possession by purchase from the Fultons, and ten years after the patent of confirmation to the representatives of Willette had been recorded in the general land office. Under these circumstances,

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Papin took a conveyance, which gave him no right to the land. When the plaintiff in error, Hall, asked the court to instruct the jury, that if they believed from the evidence that, by the plaintiff's recovery in this case, the legal representatives of Francis Willette will have been confirmed in more than ten acres of Peoria French claims, they were to find for the defendant, the prayer ought to have been apprehended by the court, according to its relation to the subject-matter in controversy, and such an instruction should have been given accordingly to the jury. The refusal, then, was error.

For the reasons given, we shall direct the judgment of the court below to be reversed; that a *venire facias de novo* shall be issued; and that the court, in its further proceedings in the cause thereon, conform to the rulings of this opinion.

ANGELINA R. EBERLY and others, Plaintiffs in Error, v. LEWIS MOORE and another.

24 H. 147.

PRACTICE—PLEA IN ABATEMENT.

It is not error in a federal court of original jurisdiction to permit, on proper showing, a plea in bar to be withdrawn, and a plea to the jurisdiction, to wit, want of proper citizenship, to be filed. Such a course is proper, and is also the exercise of a discretion not reviewable in this court.

WRIT of error to the district court for the western district of Texas.

*Mr. Hale*, for plaintiffs in error.

*Mr. Ballinger*, for defendants.

\* Mr. Justice CAMPBELL delivered the opinion of the court. [ \* 157 ]

The plaintiffs, as citizens of Kentucky, commenced a suit by petition against the defendants, as citizens of Texas, for the recovery of a parcel of land in their possession. At the return of the process the defendants pleaded to the petition the general issue, and the statute of limitations, in bar of the suit.

At the next succeeding term they moved the court, upon an affidavit charging that the allegation in the petition, "that the plaintiffs were citizens of Kentucky, was untrue, and fraudulently made to induce the court to take cognizance of the cause," and that they were citizens of Texas, for leave to withdraw their pleas, and to

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plead this matter in abatement of the suit. This motion was allowed, and pleas in abatement were filed. One of these avers that the allegation of citizenship in said plaintiffs' petition *is* not true; that said plaintiffs *are* not citizens of Kentucky, but *are* respectively citizens of Texas; wherefore he prays the dismissal of the cause for want of jurisdiction. The plaintiffs thereupon moved the court for judgment for the want of a plea. This motion was not allowed, and thereupon the plaintiffs refused to reply to the pleas in abatement, and the court then proceeded to impanel a jury, and directed them to ascertain whether, from the proof before them, the plaintiffs, or either of them, were citizens of the States of Kentucky or Texas at the date of the writ. The jury returned as their verdict, that the domicile or residence of the plaintiffs never had been changed from the State of Texas, and that their domicile or residence was in the State of Texas at the commencement of this suit. The court dismissed their petition.

[ \* 158 ] \* The plaintiffs object to the authority of the district court to permit the withdrawal of pleas in bar, for the purpose of pleading to the jurisdiction; that a plea in bar admits the jurisdiction of the court, and the capacity of the plaintiffs to sue, and that they cannot be deprived of the benefit of that admission. The equitable jurisdiction of the courts of the United States as courts of law is chiefly exercised in the amendment of pleadings and proceedings in the court, and in the supervision of all the various steps in a cause, so that the rules and practice of the court shall be so administered and enforced as to prevent hardship and injustice, and that the merits of the cause may be fairly tried. Such a jurisdiction is essential to and is inherent in the organization of courts of justice. *Bartholomew v. Carter*, 2 M. and G. 125.

But this jurisdiction has been conferred upon the courts of the United States in a plenary form by acts of congress. 1 Stat. at Large, p. 83, sec. 17; p. 335, sec. 7; p. 91, sec. 32.

It has been uniformly held in this court that a circuit court could not be controlled in the exercise of the discretion thus conceded to it. *Spencer v. Lapsley*, 20 How. 264. In the present instance the jurisdiction was properly exercised. An attempt was made, according to the affidavit on which the motion was founded, to confer upon the district court, by a false and fraudulent averment, a jurisdiction to which it was not entitled under the constitution. If true, this was a gross contempt of the court, for which all persons connected with it might have been subject to its penal jurisdiction.

The plaintiffs contend that the plea is a nullity, and that they

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were entitled to sign judgment. It is not a precise, distinct, or a formal plea, but it denies the truth of the averment of the citizenship of the plaintiffs, as they had affirmed it to be in the petition. We may say as Lord Denman said, in *Horner v. Keppel*, 10 A. and E. 17: "Where a plea is clearly frivolous on the face of it, that is a good ground for setting it aside; but the plea here is not *quite* bad enough to warrant that remedy."

Judgment affirmed.

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JOHN FITCH, Appellant, v. EDWARD CREIGHTON.

24 H. 159.

EQUITABLE JURISDICTION UNDER STATE STATUTES.

1. Where a statute of a State gives a lien for work on the streets against the adjoining lot owner, though it may give a specific mode of enforcing that lien, a court of the United States will enforce such lien in a court of equity, as the one appropriate to its jurisdiction.
2. A bill for this purpose is not multifarious, because it joins in the same bill assessments against the same person on account of different lots made at different times.
3. When the contract has solely been performed by one of two original contractors to do the work, and the city has assessed the amounts in his favor, the other contractor is not a necessary party to a suit to enforce the lien.

APPEAL from the circuit court for the northern district of Ohio. Creighton, the appellee, brought his suit against Fitch to have certain lots owned by the latter in the town of Toledo sold to satisfy his lien for work done on the street in front of the lots. The case is otherwise fully stated in the opinion.

*Mr. Cooke*, for appellant.

*Mr. Swayne*, for appellee.

\*Mr. Justice McLEAN delivered the opinion of the court. [ \* 160 ]

This is an appeal from the circuit court of the United States for the northern district of Ohio. The bill was filed by Edward Creighton, a citizen of the State of Iowa, against John Fitch, a citizen of the State of Ohio.

By the act of March 11th, 1853, (Swan's Statutes Ohio,) it is provided, "that the city council shall have power to lay off, open, widen, straighten, extend, and establish, to improve, keep in order, and repair, and to light streets, alleys, public grounds, wharves, landing places, and market spaces; to open and construct, and put in order and repair, sewers and drains; to enter upon or

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[ \* 161 ] take for such of the above purposes as may \* require it, land and material; and to assess and collect and charge on the owners of any lots or lands, through or by which a street, alley, or public highway shall pass, for the purpose of defraying the expenses of constructing, improving, and repairing said street, alley, or public highway, to be in proportion either to the foot front of the lot or land abutting on such street, alley, or highway, or the value of said lot or land as assessed for taxation under the general law of the State, as such municipal corporation may in each case determine."

Each municipal corporation may, either by a general or special law or ordinance, prescribe the mode in which the charge on the respective owners of lots or lands shall be assessed and charged to the owner, which shall be enforced by a proceeding at law or in equity, either in the name of the corporation or of any person to whom it shall be directed to be paid, but the judgment or decree was required to be entered severally; and a charge was required to be enforced for the value of the work or material on such lot or land; and where payment shall have been neglected or refused when required, the corporation shall be entitled to recover the amount assessed, and five per cent. from the time of the assessment. Swan's Stat. 963.

On the 7th of April, 1855, the city of Toledo entered into a contract with Creighton, and one Edward Connelly, who bound themselves to do certain work on the streets, for the sums named in the contract; and that so soon as the work was completed, the street commissioner should give them a certificate to the effect, and on the presentation of the same to the council, it would assess the cost and expenses of the improvement on the lots or lands made liable by law to pay the same, and make out and deliver to the contractors a certified copy of said assessments, and authorize them or assigns to collect the several amounts due and payable for the work and improvement.

Creighton purchased from Connelly his interest in the contract, and went on and performed the work under it, to the acceptance of the city. On the 14th of July, 1856, the council made an assessment on the lots abutting on the improvement in Monroe [ \* 162 ] street, to pay the expenses of that work and \* directed that the owners of the lots make payment of the assessments to Creighton. Among the rest, lot 640, belonging to John Fitch, was assessed for this work \$84.56.

On the 20th May, 1856, the council made an assessment upon the lots abutting on said improvement in Michigan street, to pay



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for the same, and also directed the owners of these lots to make payments of such assessments to Creighton. Among the lots so assessed were the following, owned by defendant, numbered 547, 538, 539, 544, 1,461; the assessments of the respective lots amounted to the sum of \$1,791.76; and subsequently a further assessment was made on the contract of three lots, numbered 686, 751, and 855, which amounted to the sum of \$266.47. The above sums were ordered to be paid to the complainant, with five per centum allowed by law.

To this bill the defendant demurred, which, on argument, was overruled. And the court ordered the above sums to be paid in ten days, or in default thereof that the lots be sold, &c.

From this decree an appeal was taken. On the part of the appellant it is claimed, that upon the facts of the case, the circuit court had no jurisdiction; that the equity jurisdiction of the courts of the United States depends upon the principles of general equity, and cannot, therefore, be affected by any local remedy, unless that remedy has been adopted by the courts of the United States.

By the 34th section of the judiciary act of 1789, it is declared "that the laws of the several States, except where the constitution, treaties, or statutes of the United States shall require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." This section does not relate to the practice of our courts, but it constitutes a rule of property on which the courts are bound to act.

The courts of the United States have jurisdiction at common law and in chancery, and wherever such jurisdiction may be appropriately exercised, there being no objection to the citizenship of the parties, the courts of the United States have jurisdiction. This is not derived from the power of the State but from the laws of the United States.

\*In *Clark v. Smith*, 13 Peters, 203, the court say "the [\* 163] State legislatures certainly have no authority to prescribe the forms and modes of proceeding in the courts of the United States; but having created a right, and at the same time prescribed the remedy to enforce it, if the remedy prescribed is substantially consistent with the ordinary modes of proceeding on the chancery side of the federal courts, no reason exists why it should not be pursued in the same form as it is in the State courts."

In the case above cited, the legislature of Kentucky authorized a person who was in possession of land claimed by him, and some one else had a claim on the same land; the possessor was author-

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ized to file a bill against the claimant to litigate his title and remove the cloud from it.

The statute authorizes a suit at law or in equity, but from the nature of the case it would seem that chancery was the appropriate mode.

There was no necessity to make Connelly a party in this case. He made the contract jointly with Creighton. But before the work was commenced Connelly relinquished his right to Creighton, who performed the whole work, and to whom the city council promised payment. The assessments, too, were made to Creighton, and he was considered the only contractor with the city. No right was held under Connelly. By the statute the city makes an assessment which is to be paid by the owner personally, and it is also made a lien on the property charged. This charge may be collected and the lien enforced by a proceeding at law or in equity, either in the name of the city or its appointee. The claimant is the appointee for this purpose, and his right is too clear to admit of controversy.

This bill is not multifarious; the assessments were assessed on the lots by the foot front, and all against the same defendant.

Lord Cottenham, in *Campbell v. Mackay*, 7 Simon, 564, and in *Mylne v. Craig*, 603, says, to lay down any rule, applicable universally, or to say what constitutes multifariousness, as an abstract proposition, is upon the authorities, utterly impossi-

[ \* 164 ] ble. \* Every case must be governed by its circumstances; and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject. Whilst parties should not be subjected to expense and inconvenience in litigating matters in which they have no interest, multiplicity of suits should be avoided by uniting in one bill all who have an interest in the principal matter in controversy, though the interests may have arisen under distinct contracts.

We think the statute of the State, and the municipal corporation of Toledo, authorizes the assessment of the sums on the lots in question, and that the judgment in the circuit court must be affirmed.

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WILLIAM H. PHILLIPS, Plaintiff in Error, v. GEORGE PAGE.

24. H. 161.

PATENT LAW—NOTICE OF PRIOR INVENTION—CLAIM.

1. A specification and claim in a patent which describes only such machinery as had been formerly used in the same manner, cannot be made valid by a new use or application to an enlarged operation. If the adaptation of the machine to a new use

## Phillips v. Page.

is matter of invention, it should be claimed, and the new means by which it is so adapted set forth in the specification or claim.

2. It is only necessary, in notice of prior use, to give the name of the party, his place of residence, and the place of prior use. A notice, therefore, which gives the date of prior use does not limit the party to that date in his proof.

WRIT of error to the circuit court for the northern district of New York.

*Mr. Keller*, for plaintiff in error.

*Mr. Reverdy Johnson* and *Mr. Latrobe*, for defendant.

\* Mr. Justice NELSON delivered the opinion of the court. [ \* 165 ]

This is a writ of error to the circuit court for the northern district of New York.

The suit was brought in the court below by Page, the defendant in error, to recover damages for the infringement of a patent for certain improvements in the construction of the portable circular saw-mill. After describing minutely the different parts, and manner of constructing the machine, with drawings annexed, and also the use and operation of the respective parts, the patentee sets forth the particular portion of the construction which he claims as his own, as follows :

"I claim the manner of *affixing and guiding the circular saw, by allowing end-play to its shaft, in combination with the means of guiding it (the saw) by friction rollers, embracing it near its periphery, so as to leave its centre entirely unchecked laterally.* I do not claim the use of friction rollers, embracing and guiding the edge of a circular saw, as these have been previously used for that purpose ; but I limit my claim to their use, in combination with a saw having free lateral play at its centre."

Evidence was given on the part of the defendant, in the course of the trial, tending to prove that, long before the time of granting the plaintiff's patent, and before the date of his invention, machines for sawing shingles from short blocks of \* timber, and sawing lath and blinds for windows, with [ \* 166 ] circular saws, varying in size from ten to thirty inches in diameter, had been in public use ; in which machines the circular saw was guided by means of guide-pins, embracing it (the saw) near the periphery, and its shaft having end-play, and being entirely unchecked laterally ; but it did not appear that such machines had been used in a saw-mill for sawing timber, or in a mill, or a machine of a size or character adapted to the sawing of ordinary logs, or other large unsawed timbers.

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When the evidence closed, the defendant's counsel prayed the court to charge the jury, that according to the true construction of the patent, the claim is for the manner of affixing and guiding the circular saw, by allowing end-play to its shaft, in combination with the means of guiding it by friction rollers, embracing it near its periphery, so as to leave its centre entirely unchecked laterally.

But the court refused so to charge, and instructed the jury that the claim was limited to the manner of affixing and guiding the circular saw, by allowing end-play to its shaft, in combination with the means of guiding it by friction rollers, embracing it near its periphery, so as to have its centre unchecked laterally, *in a saw-mill capable of being applied to the sawing of ordinary logs.*

And in refusing another prayer, the court charged, that in order to defeat the plaintiff's patent by the use of prior machines of this construction, they must have been machines for the purposes of sawing in mills of a size and character adapted to the sawing of ordinary logs.

There can be no doubt but that the improvements of the patentee in the manner of constructing the portable circular saw-mill described in his specification were designed to adapt it to the sawing of logs in a saw-mill, and which could be carried from place to place, and put into operation by the use of horse-power; and it may very well be, if he had set up in his claim the improvements or particular changes in the construction of the old machine, so as to enable him to adapt it to the new use, and one to which the old had not and could not have been applied without [ \* 167 ] these changes, the patent \*might have been sustained.

The utility is not questioned, and, for aught there appears in the case, such improvements were before unknown, and the circular saw-mill for sawing logs the first put in successful operation.

But no such claim is set up by the patentee; nor does he distinguish in the description of the parts of the machine, nor in any other way, the old from the new, or those parts which he has invented or added in its adaptation to the use of sawing logs, not before found in the old machine for sawing shingles, blinds for windows, and other light materials. On the contrary, his claim is for the precise organization of the old machine, namely, the manner of affixing and guiding the circular saw, by allowing end-play to its shaft, in combination with the means of guiding it by friction rollers, embracing it near to its periphery, so as to leave its centre entirely unchecked laterally. There is nothing new in this combination. It had long been known and used in the circular

saw for sawing timbers of smaller dimensions than an ordinary saw-log. Nor does the enlargement of the organization of the machine compared with the old one, (the same being five feet in diameter, and the other parts corresponding,) afford any ground, in the sense of the patent law, for a patent. This is done every day by the ordinary mechanic in making a working machine from the patent model.

The patentee in the present case must carry his improvements farther, in order to reach invention; he must contrive the means of adapting the enlarged old organization to the new use, namely, the sawing of saw-logs, and claim, not the old parts, but the new device, by which he has produced the new results.

The learned judge, by interpolating the new purpose of the improvement, namely, the sawing of logs, not only inserted what was not specified in the claim; but, if it had been, it would not have helped out the difficulty, as it was in effect, upon the construction given, simply applying an old organization to a new use, which is not a patentable subject.

The defect here is both in the specification and in the claim. \*The former does not distinguish the new parts [ \* 168 ] from the old, nor is there anything in the specification by which they can be distinguished; and the latter, instead of claiming the old parts, should have excluded them, and claimed the new, by which the old were adapted to the new use, producing the new result.

We are also of opinion the court below erred in rejecting the evidence of the witness as to the prior knowledge and use of the improvement of the patentee.

The 15th section of the patent law provides, that when the defendant relies in his defense on the fact of a previous invention, knowledge, or use of the thing patented, he shall give notice of the names and places of residence of those whom he intends to prove possessed the prior knowledge, and where the same was used.

In this case, the notice stated that Hiram Davis, who resides at Fitchburg, Massachusetts, had knowledge of the said improvement, and of the use thereof at that place, during the years 1836, 1837, 1838, &c., and that he resided there.

The court, on objection, refused to allow a witness to prove the use of the improvement by Davis prior to the year 1836 at Fitchburg, holding that the notice limited it within that time.

Notice of the time when the person possessed the knowledge or use of the invention is not required by the act; the name of the

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person, and of his place of residence, and the place where it has been used, are sufficient.

The time, therefore, was not material; nor could it have misled the plaintiff, as he had the name and place of residence of the person, and also the place where the improvement had been used.

With this information of the nature and ground of the defense, the plaintiff was in possession of all the knowledge enabling him to make the necessary preparation to rebut that the defendant possessed to sustain it.

Judgment reversed and venire.

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JOHN C. ALMY, JR., Plaintiff in Error, v. THE STATE OF CALIFORNIA.

24 H. 169.

CONSTITUTIONAL LAW—STATE TAX ON EXPORTS.

1. A statute of the State of California which imposes a stamp duty on every bill of lading given for gold or silver in coin or bars or in other form transported from any point in the State to any point without the State, is in effect a tax upon the gold or silver so transported.
2. It is therefore a tax upon a specific class of exports, and is forbidden by the constitution of the United States, and the law imposing it is therefore void.

THIS is a writ of error from the court of sessions of the city and county of San Francisco in the State of California. The case is very fully stated in the opinion.

*Mr. Blair*, for plaintiff in error.

*Mr. Benjamin*, for defendant.

[ \* 172 ] \*Mr. Chief Justice TANEY delivered the opinion of the court.

The only question in this case is upon the constitutionality of a law of California, imposing a stamp tax upon bills of lading.

By an act passed by the legislature of that State to provide a revenue for the support of the government from a stamp tax on certain instruments of writing, among other instruments mentioned in the law, a stamp tax was imposed on bills of lading for the transportation from any point or place in that State, to any point or place without the State, of gold or silver coin, in whole or in part, gold-dust, or gold or silver in bars or other form; and the law requires that there shall be attached to the bill of lading, or stamped thereon, a stamp or stamps expressing in value the amount of such tax or duty.

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By a previous law upon the same subject it was made a misdemeanor, punishable by fine, to use any paper without a stamp, where the law required stamped paper to be used.

After the passage of these acts, Almy, the plaintiff in error, being the master of the ship *Ratler*, then lying in the port of San Francisco, and bound to New York, received a quantity of gold-dust for transportation to New York, for which he signed a bill of lading upon unstamped paper, and without having any stamp attached to it. For this disobedience to the law of California he was indicted in the court of sessions for a misdemeanor, and at the trial the jury found a special verdict setting out particularly the facts, of which the above is a brief summary; and upon the return of the verdict the counsel for the defendant moved for a judgment of acquittal, \*upon the ground that the law of [ \* 173 ] California was repugnant to the constitution of the United States. But the court decided that the State law was not repugnant to the constitution of the United States, and adjudged that Almy should pay a fine of \$100 for this offense. And the court of sessions being the highest court of the State which had jurisdiction of the matter in controversy, this writ of error is brought to revise that judgment.

We think this case cannot be distinguished from that of *Brown v. The State of Maryland*, reported in 12 Wheat. 419. That case was decided in 1827, and the decision has always been regarded and followed as the true construction of the clause of the constitution now in question.

The case was this: The State of Maryland, in order to raise a revenue for State purposes, among other things required all importers of certain foreign articles and commodities enumerated in the law, or other persons selling the same by wholesale, before they were authorized to sell, to take out a license, for which they should pay \$50; and in case of refusal or neglect, should forfeit the amount of the license tax, and pay a fine of \$100, to be recovered by indictment.

Brown, who was an importing merchant, residing in Baltimore, refused to pay the tax, and was thereupon indicted in the State court, which sustained the validity of the State law, and imposed the penalty therein prescribed. This judgment was removed to this court by writ of error, and it will be seen by the report of the case that it was elaborately argued on both sides, and the opinion of the court, delivered by Chief Justice Marshall, shows that it was carefully and fully considered by the court. And the court decided that this State law was a tax on imports, and that the mode of

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imposing it, by giving it the form of a tax on the occupation of importer, merely varied the form in which the tax was imposed, without varying the substance.

So in the case before us. If the tax was laid on the gold or silver exported, every one would see that it was repugnant to the constitution of the United States, which in express terms declares that "no State shall, without the consent of congress, [ \* 174 ] \*lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

But a tax or duty on a bill of lading, although differing in form from a duty on the article shipped, is in substance the same thing; for a bill of lading, or some written instrument of the same import, is necessarily always associated with every shipment of articles of commerce from the ports of one country to those of another. The necessities of commerce require it. And it is hardly less necessary to the existence of such commerce than casks to cover tobacco, or bagging to cover cotton, when such articles are exported to a foreign country; for no one would put his property in the hands of a ship-master without taking written evidence of its receipt on board the vessel, and the purposes for which it was placed in his hands. The merchant could not send an agent with every vessel, to inform the consignee of the cargo what articles he had shipped, and prove the contract of the master if he failed to deliver them in safety. A bill of lading, therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported. And if the law of California is constitutional, then every cargo of every description exported from the United States may be made to pay an export duty to the State, provided the tax is imposed in the form of a tax on the bill of lading, and this in direct opposition to the plain and express prohibition in the constitution of the United States.

In the case now before the court, the intention to tax the export of gold and silver, in the form of a tax on the bill of lading, is too plain to be mistaken. The duty is imposed only upon bills of lading of gold and silver, and not upon articles of any other description. And we think it is impossible to assign a reason for imposing the duty upon the one and not upon the other, unless it was intended to lay a tax on the gold and silver exported, while all other articles were exempted from the charge. If it was intended merely as a stamp duty on a particular description



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of paper, the bill of lading of any \*other cargo is in the [ \* 175 ] same form, and executed in the same manner and for the same purposes, as one for gold and silver, and so far as the instrument of writing was concerned, there could hardly be a reason for taxing one and not the other.

In the judgment of this court the State tax in question is a duty upon the export of gold and silver, and consequently repugnant to the clause in the constitution hereinbefore referred to; and the judgment of the court of sessions must therefore be reversed.

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MEEHAN and BALLANCE, Plaintiffs in Error, v. ROBERT FORSYTH.

24 H. 175.

PEORIA VILLAGE LOTS.

1. Where land was entered at the appropriate land office, and a patent issued with a reservation of the rights of persons claiming under the confirmation act of 1823, (3 U. S. Statutes, 786 :) Held, that this did not operate to hinder the statute of limitations from running in favor of the patentee as against the right of one claiming a part of the land under the act of 1823, and a survey under it.
2. This saving clause cannot be construed as recognizing the existence of a superior title to part of the land, nor prevent possession under it from being adverse to the claimant under the act of 1823.

WRIT of error to the circuit court for the northern district of Illinois. The case is stated in the opinion.

*Mr. Ballance*, for plaintiffs in error.

*Mr. Archibald Williams*, for defendant.

Mr. Justice CAMPBELL delivered the opinion of the court.

This is an action of ejectment commenced in the circuit \*court for the recovery of a part of two lots of land in the [ \* 176 ] city of Peoria by the defendant in error against the plaintiffs in error.

The title of the plaintiff in the circuit court (Forsyth) originated in the claim of Antoine Lapance, an inhabitant within the purview of the act of congress, approved March 3d, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois," which was surveyed the first of September, 1840, by the surveyor of public lands, and for which a patent issued on the first day of February, 1847. The plaintiff produced from the surveyor general's office a certified copy of the survey, according to which the location of the claim was made. This testimony was

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objected to, but was received by the court, and we think properly. An original of the plan of survey is retained in the office of the surveyor general, and a copy given by that officer, who is required to keep it, upon general principles is admissible in evidence. *United States v. Percheman*, 7 Pet. 51.

It was agreed on the trial, that the defendant Ballance, and those under him, had been in possession of the premises more than ten years before the commencement of the suit. This possession was shown by the facts, that he had cultivated a portion of the quarter section described in his patent for more than twenty years, and had resided on the quarter section for twelve years, and had paid taxes upon this parcel of land as a part of the said quarter section, but not as a separate subdivision. The plaintiff had not paid any of the taxes during that period. The defendant Ballance made an entry of the quarter section, of which the lot in controversy forms a part, in 1837, and a patent issued to him in 1838, by which the United States gave and granted to him and his heirs, subject to the rights of any and all persons claiming under the act of congress of 3d March, 1823, before referred to.

The defendant moved the court to instruct the jury, that if they believe from the evidence that said Ballance has had the actual possession by residence on the land in controversy for more than seven years, under the title he has exhibited, the plaintiff cannot recover; and that the words in the patent of Ballance of January [\* 177] 28, 1838, "subject, however, to the rights \*of all persons claiming under the act of congress of March, 3d, 1823, entitled 'An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois,' cannot operate as to lessen the estate vested by the granting part of the deed."

The court declined to give these instructions, but charged the jury: "That to constitute an adverse possession against the French claimants by the possession of another portion of the quarter section by the defendant, as his tenant, entry and possession must have been under a claim of title inconsistent with that of the French claimants. If the entry and possession were subject to the rights of the claimants existing under the acts of congress, then such possession as stated could not be adverse, so long as that possession did not actually extend to the lot sued for."

The court further instructed the jury: "That when the defendant made application for a pre-emption, he stated it was made subservient to these French claims; and when the patent was issued by the government to him for this fractional quarter, it was made subject to these claims; therefore, the grant made by the

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Meehan v. Forsyth.

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government, as contained in the patent, did not necessarily operate as a conveyance of the entire quarter section to the grantee, but the clause inserted in the patent had the effect of excluding from the operation of the grant that portion of the quarter covered by these French claims; consequently, if at the time of the grant to Ballance there was any one capable of taking lot 63, under the acts of congress of 1820 and 1823, then lot 63 was excluded by law and by the terms of the grant, and was excepted, (in other words, lot 63 was not granted to Ballance,) and he took his title subject to such exclusion or exception."

We think that the circuit court erred in its interpretation of this patent. The patent recites that "full payment" had been made by the grantee for the southwest fractional quarter of section nine, in township eight north, of range eight east, containing one hundred and forty-seven  $\frac{43}{100}$  acres, according to the official plat of the survey of said lands returned to the general land office by the surveyor general; which said tract has been purchased by Charles Ballance. It proceeds to \*declare that the [\*178] United States had given and granted the said tract above described, to have and to hold the same to him and his heirs, subject, however, to the rights of any and all persons claiming, &c., &c. This saving clause was designed to exonerate the United States from any claim of the patentee, in the event of his ouster by persons claiming under the acts referred to, and cannot be construed as separating any lots or parcels of land from the operation of the grant, or as affording another confirmation of titles existing under the acts of congress described in it. The possession of Ballance, under this patent, was adverse to that of the claimants under the acts of 1820 and 1823, in every case in which their claim was not specifically admitted by him. He was in no sense their tenant, nor did the saving in the act create any fiduciary relation between him and any other person, so as to prevent the operation of the statute of limitations. The patent does not impose upon him any duty to recognize these claims. It only requires him to accept the title of the United States with knowledge that such claims exist, and that they do not intend to deny or to destroy them, nor to defend his title against them.

The case of *Bryan v. Forsyth*, 19 How. 334, involved a controversy for a lot in the city of Peoria, similarly situated as that which forms the subject of this suit. The court, in that case, said that a patent with a saving like that we are considering was a fee-simple title on its face, and is such a title as will afford protection to those claiming under it, either directly or having a title connected with

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it, with possession for seven years, as required by the statute of Illinois.

The act of limitations of Illinois (Revised Statutes, 349, sec. 8) protects the claim of a person for lands, which has been possessed by actual residence thereon, having a connected title in law or equity, deducible of record from that State or the United States.

The title of the defendant, and the possession which he was admitted to have had, fulfilled the requisitions of the law, and the court should have given the instructions asked for, and erred in giving the instructions submitted to the jury.

[ \* 179 ] \* Judgment reversed and cause remanded.

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GREGG and BALLANCE, Plaintiffs in Error, v. FORSYTH.

24 H. 179.

PEORIA VILLAGE LOTS—LIMITATION—EVIDENCE.

1. The volumes of the American State Papers, three of which were published by Duff Green, under the revision of the secretary of the senate, by order of the senate, contain authentic papers which are admissible as evidence without further proof.
2. A record of a suit in partition, resulting in a decree, and sale under it, are admissible in evidence against persons not claiming under that title, notwithstanding irregularity in the conduct of the case or in the sale. Third persons cannot assail it for these reasons.
3. Where a party by himself and tenants have possession of a part of a larger tract included in one patent, and which is subdivided into lots or parcels, it is for the jury to determine under all the circumstances whether residents on one of these lots were actual residents of the lot in controversy. It is not necessary that they should have a house or actual residence on such part of the whole tract to constitute adverse possession.

WRIT of error to the circuit court for the northern district of Illinois. The case is stated in the opinion.

*Mr. Ballance*, for plaintiff in error.

*Mr. Williams*, for defendant.

Mr. Justice CAMPBELL delivered the opinion of the court.

This was an action of ejectment for a lot of land in the city of Peoria, in the State of Illinois, commenced by the defendant in error against the plaintiffs in error.

The title of the plaintiff in the circuit court is shown by a patent of the United States in favor of the legal representatives of Antoine Lapance, who was an inhabitant or settler within the purview of the act of congress approved 3d March, 1823, entitled "An act to

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confirm certain claims to lots in the village of Peoria, in the State of Illinois," which patent bears date the first day of February, 1847, and is founded upon an official survey of the first of September, 1840. The plaintiff deraigned his title from the patentees. In tracing his title he \*read a document relevant [ \*180 ] to the cause from a volume of American State Papers, Public Lands, selected and edited under the authority of the senate of the United States, by its secretary, and printed by Duff Green. This was objected to, and the question reserved by the defendants. The volumes of the American State Papers, three of which were published by Duff Green, under the revision of the secretary of the senate, by order of the senate, contain authentic papers which are admissible as testimony without further proof.

*Watkins v. Holman*, 16 Pet. 25. The plaintiff read a copy of a deed from the public records, the original of which was not in the possession of the plaintiff, and which, upon inquiry of the persons with whom it had been deposited, he was informed, had been lost. This testimony authorized the admission of the copy as evidence. The deed in question had been regularly recorded. No suspicion attached to the instrument, and there was no reason to suppose that the better testimony was fraudulently withheld or could have been obtained by further inquiry. *Minor v. Tillotson*, 7 Pet. 99.

He also read in evidence a record of a suit of partition in the circuit court of Peoria county, which resulted in a decree of sale of the interests of a number of the parties, under which the plaintiff derived his title as a purchaser. The defendants objected to the record and deed of sale, because the sale had not been conducted with regularity, and the decree of sale had been rendered against infants, by default, and because it did not prescribe the manner of the sale. These, with other objections, were properly overruled by the circuit court. The defendants were strangers to these proceedings, and cannot be allowed to object to a result of which the parties to the decree have not complained.

The title of the defendants consisted of a patent from the United States to the defendant, Ballance, in January, 1838, for a fractional quarter section of land that includes the lot in controversy, and containing a saving of the rights of any and all persons claiming under the act of congress of 3d March, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois." He made proof \*that he had [ \*181 ] resided on this quarter since 1844, and had cultivated portions of it for a long time previously, and had before and since that date let other portions of it to tenants who occupied it under

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him, and that the particular lot in controversy had been occupied by one of these tenants, who had upon it a distillery. Among other instructions, the defendants requested the court to charge the jury, "that if they should believe from the evidence that said Ballance, being in possession under the title he has exhibited, leased the particular spot of ground in controversy to Almiron S. Cole more than seven years before the commencement of this suit, and that said Cole took possession thereof, and built a steam distillery and other fixtures thereon more than seven years before the commencement of this suit, and that said Cole held possession thereof, and occupied it as a place of business, until he sold said establishment to Sylvanus Thompson, and that Sylvanus Thompson and his son-in-law, Richard Gregg, the defendant, occupied the same until the death of Thompson, and that said Gregg occupied the same until the commencement of this suit, the plaintiff is not entitled to recover in this suit; that it was not necessary for this defense that either the said Cole, Thompson, or Gregg, should have had his dwelling-house on the particular lot; it is sufficient if they lived in the vicinity and occupied the lot in controversy as their place of business." The circuit court refused to give these instructions, but charged the jury, "that if Ballance had his house on one part of the quarter, and his improvement extended over and included the lot in controversy, so as to be connected with his residence, and to form part thereof, or it was used in connection therewith, that would, within the meaning of the law, constitute actual residence. If Ballance built on one part of the quarter, and this lot was left vacant and unoccupied and unimproved, that would not, as to that lot, constitute an actual residence.

"If Ballance, his tenants, or those holding under him, actually resided on a lot adjoining lot 63 for seven years immediately preceding the commencement of this suit, and during all that time occupied lot 63 as a place of business, as part and parcel of the premises so resided on by them, that would constitute [ \* 182 ] \* an actual residence within the meaning of the law, as to this lot in controversy. It is proper for the jury to consider the circumstances of the subdivision of the land into lots and blocks by Ballance, in April, 1846, and whether a severance of the holding as to the particular lots and blocks so subdivided was thereby enacted. When ground is subdivided in that manner under our law, there can be no doubt that different lots and blocks may be so occupied as to constitute an actual residence in them all; but ordinarily, in case of subdivision, the construction of a house on a separate lot or block, and a residence therein, without any

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connection with adjoining or neighboring lots or blocks, does not constitute an actual residence as to the whole. It is for the jury to determine whether the facts and circumstances stated by the defendant, Ballance, of those claiming under him, made them actual residents of the lot in controversy, for seven years before the commencement of this suit. If they did, then the defendants are within the protection of the statute; otherwise not."

This court, in the cases of *Bryan v. Forsyth*, 19 How. 334, and again in *Meehan v. Forsyth*, at this term, have decided that the saving in the patent under which the defendants claim did not create any fiduciary relation between the claimants under the act of congress of 1823, referred to in it, and the patentee; and that the possession of Ballance, under his patent, was an adverse possession, unless another relation had been created by contract between them subsequently to the issuing of the patent. The present inquiry is, by what evidence must the actual residence on the land be supported to enable the patentee to have the benefit of the act of limitations for seven years? And it has been generally held, that the residence and possession of land for seven years by a tenant inures to the benefit of the landlord, so as to secure for him the protection of the act; and that this protection is not confined to the particular close upon which the claimant resides, but also extends to the entire parcel of land of which the legal possession has been maintained as a consequence of his actual possession and residence.

*Poage v. Chinn*, 4 Dana, Ky. R. 50.

\* The case of *Williams v. Ballance*, 23 Ill. 193, involved [ \* 183 ] a controversy similar to that before the court.

The inquiry there was as to the validity of the residence and possession of Ballance to support his defense of the statute of limitations, it being the residence and possession established by the testimony in this suit. The supreme court of Illinois inquires whether Ballance occupied the premises described in the patent since 1844, by actual residence thereon. "The fact," says the court, "is that he did, but he did not reside upon every square yard of the premises, nor upon the particular lot. Nor was this necessary. He resided upon the legal subdivision described in the patent, the evidence of his title, and possessed and occupied it by himself and tenants. We think the laying out the land into town lots did not deprive him of the benefits of the statute of limitations of 1835, as to all the fractional quarter, except the particular lot upon which his house stood. He had a right to divide into as many lots, or portions, or divisions as he pleased, and put a separate tenant on

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each, and their occupation would be his possession: and the law only required him to possess and reside upon the premises claimed by his title-papers, but the law does not say upon what portion he should reside, and, above all, it does not declare that he should reside upon every portion of it." The instructions of the circuit court are inconsistent with the law as thus laid down by the supreme court. In our opinion, the possession established by Ballance in this case was such as placed him under the protection of the statute.

Judgment reversed and cause remanded.

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CHARLES BALLANCE, Appellant, v. ROBERT FORSYTH and others.

24 H. 183.

EQUITY—RELIEF DENIED AGAINST JUDGMENT AT LAW.

1. The party defeated in an action at law, the judgment in which has been affirmed on writ of error to this court, cannot resort to a court of chancery to contest the relative merits of the legal title involved in that suit.
2. His claim for improvement in the lots recovered by the judgment at law is so vague and unsatisfactory that the bill was rightfully dismissed by the circuit court.

APPEAL from the circuit court for the northern district of Illinois.  
The facts are stated in the opinion.

*Mr. Ballance, per se.*

*Mr. Williams, for appellees.*

[ \* 184 ] \* Mr. Justice CAMPBELL delivered the opinion of the court.

This is a bill filed by the plaintiff to enjoin the execution of a judgment in the circuit court, upon which a writ of error had been taken to this court and affirmed.

The cause in this court was between the same parties, and the decision of the court is reported in 13 How. S. C. R. 18.

The plaintiff sets forth the claims of the respective parties, and insists that his is the superior right, and that he is entitled to have the property. But it is not allowable to him to appeal from the judgment of the circuit court and supreme court to a court of chancery upon the relative merit of the legal titles involved in the controversy they had adjudicated.

He further objects to the title of his adversaries. He insists that in the location of their claim under the acts of May, 1820, and



March, 1823, referred to in the report of the case as the source of their title, there was an erroneous location and survey, and that a larger extent of ground was conceded to [\* 185] them than they were entitled to; that the plan of survey did not conform to the requirement of congress, and that their proofs were not filed in time. If either of these objections is of sufficient force to invalidate the title and to render it void, it should have been urged upon the trial at law, and it is too late after judgment upon the title to employ it to contest the issuing of the execution. But if they are mere irregularities, the court of chancery has no jurisdiction to notice them. It is the settled doctrine of this court, that in the location and survey of claims arising under acts of congress like those of May, 1820, and March, 1823, the executive department of the government has, in general, exclusive jurisdiction, and that all questions arising upon their location and survey are administrative in their nature, and must be disposed of in the land office.

The plaintiff was aware of the existence of these claims, and of the jurisdiction to which their adjustment was confided.

His patent contains an explicit reservation of the rights of any and all persons claiming under the act of Congress of 3d March, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois." If he pretermitted his opposition to their location and survey before the general land office, he is concluded by his laches. If his opposition was made unsuccessfully, the decision of that department upon his objections is binding upon him.

Besides these objections, the plaintiff has introduced into the record a claim for the improvements upon the lots recovered by the judgment of the circuit court. It is not at all clear that the amendments to the bill in which this claim is contained were filed with leave, and form any part of the bill. It is not charged in them that the plaintiffs in the suits at law have opposed any obstruction to his removal of the improvements, and the entire statement of the bill concerning them is vague and unsatisfactory. We are unable to find in them any ground upon which the suspension of the execution of the judgment can be justified.

The decree of the circuit court is affirmed.

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HENRY M. KELLOGG and others, Plaintiffs in Error v. ROBERT FORSYTH.

24 H. 186.

PRACTICE IN SUPREME COURT.

Where a judgment is recovered in ejectment against a tenant, his landlord having defended the suit, can take a writ of error in the name of the heirs of the tenant after his death, and they cannot have the writ dismissed if the landlord will give a bond to protect them against costs.

WRIT of error to the circuit court for the northern district of Illinois. The facts on which the motion to dismiss the writ is founded are stated in the opinion.

*Mr. Williams*, for the motion.

*Mr. Ballance, contra.*

[ \* 187 ] \* Mr. Justice CAMPBELL delivered the opinion of the court.

The defendant in error recovered a judgment in ejectment in the circuit court of the United States for the northern district of Illinois against William Kellogg, deceased, as tenant in possession of a parcel of land in that district. After the judgment, the defendant died. The attorney of the decedent, who was also his landlord, and who had conducted the suit on behalf and in the name of the tenant, with his consent, sued out a writ of error to this court in the name of the heirs of said Kellogg. The bond for the prosecution of the writ, and the stipulation for costs in this court, have been supplied by the said attorney. One of the heirs of Kellogg objects to the prosecution of the writ of error, and alleges, on behalf of himself and his co-heirs, that it is prosecuted without authority, and that they have no desire that it should be maintained, and authorize the attorney of the defendant in error to move for its dismissal. It appears to the court that the attorney of the deceased defendant is a *bona fide* claimant of the land, and that he is prosecuting the writ of error in good faith. That he is responsible for the costs and damages that may arise from the use of the names of the plaintiffs in error. The statutes of Illinois require that the declaration in ejectment shall be served upon the actual occupant, and the practice of the courts of that State authorizes the appearance of the landlord, and his defense of the suit, either in his own name or that of the tenant, with his consent. *Williams v. Brunton*, 3 Gilman R. 600.

And when a landlord has undertaken the defense of a suit in

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the name of the tenant, with his consent, the tenant cannot interfere with the cause to his prejudice. *Doe v. Franklin*, 7, Taun. 9. We think it was competent to the landlord to use the names of the plaintiffs to prosecute his writ of error upon his engagement to bear all the costs and expenses of the suit. Should the judgment be reversed, and the cause remanded to the circuit court for further proceedings, he may apply in that \*court for [\*188] leave to become defendant, instead of the heirs of the tenant.

Motion to dismiss overruled.

THOMAS RICHARDSON, Plaintiff in Error, v. THE CITY OF BOSTON.

24 H. 188.

NUISANCES—DUTIES OF CITIES AS TO DRAINS—EVIDENCE.

1. The cases of *Boston v. Lecraw*, 17 How. 426, (21 Curtis, 590,) and *Richardson v. City of Boston*, 19 How. 263, (1 Miller, 675,) considered and explained.
2. Proceedings on an indictment may be introduced as evidence in a civil suit, but they are not conclusive, and if the judgment of the court was founded on erroneous instructions to the jury, they are of little value.
3. A city cannot lay out a street or highway in the water of the ocean, and if there is no evidence of such an attempt, or of dedication of a vacant space between two wharves by the city, it is right in the court to say so to the jury.

WRIT of error to the circuit court for the district of Rhode Island. The matter is well stated in the opinion.

*Mr. Carlisle* and *Mr. Badger*, for plaintiff.

*Mr. Cushing* and *Mr. Chandler*, for defendant.

\*Mr. Justice GRIER delivered the opinion of the court. [\*191]

This is the third time in which this claim to have damages from the city of Boston, for erecting drains and sewers on their own land for the preservation of the health of the city, has come before us.

The plaintiff is the owner of two wharves, called Bull's wharf and Price's wharf, running from high-water to low-water mark. The space between these two wharves belongs to the city of Boston, being situated at the foot of Summer street; and as it was but thirty feet wide, it became, by the mere accident of its position, a very convenient dock, or slip, for plaintiff, so long as the city did not see fit to reclaim their land. Formerly, the drains and sewers which ran under Summer street discharged at the end of that street

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at high-water mark ; but, as the city increased, this dis-  
[ \* 192 ] charge of drainage \*became pestilential, and a nuisance  
to the neighborhood. To remedy this evil, the city was  
compelled to extend their drains out to low-water mark, and this  
is the nuisance complained of in this and the other suits.

The case of *Lecraw v. Boston* (to be found in 17th Howard, 426)  
first introduced this controversy to this court. *Lecraw* was tenant  
of *Richardson*, and his title consequently the same. It was claimed  
that the city of Boston, by not wharfing out their land at the end  
of Summer street, had dedicated it to the public, or rather to the  
private use of *Richardson*, to whose wharves it afforded a most con-  
venient dock or slip. This claim was declared by this court to be  
wholly without foundation; and that "whether it was called 'town  
dock' or 'public dock,' it would furnish no ground to presume that  
the city had parted with their right to govern and use it in the  
manner most beneficial to the citizens."

It is not our purpose to again discuss this question, or again  
repeat the arguments and principles on which our judgment was  
founded. The correctness of that decision has not been impugned  
or denied, and it needs no interpretation.

During the pendency of this suit of *Lecraw*, the tenant, and  
before its decision in this court, *Richardson* had brought a suit for  
damage to his reversion by the same alleged nuisances, and the  
verdict and judgment being for less than two thousand dollars,  
the city could not have a writ of error to reverse it, as in the other  
case. When the present case came on for trial, the decision of  
this court in the *Lecraw* case being known, in order, if possible,  
to avoid the effect of that decision, a new count was added to the  
declaration, drawn with great ingenuity and subtlety, charging  
that "*there had been A HIGHWAY, or TOWN WAY, or PUBLIC WAY, to  
the sea or low water, duly laid and established pursuant to law;*"  
and that the drains made by the city had "caused mud, earth,  
and other materials, to be thrown and deposited upon and near  
the said wharves."

The report of our decision on this case will be found in 19th  
Howard, 263.

We then decided that a former verdict and judgment in  
[ \* 193 ] an \*action on the case for continuance of the same nui-  
sance was not conclusive evidence, but is permitted to go  
to the jury as persuasive evidence. We stated in what cases it  
ought to have weight, and in what it could have little or none, as  
where the former verdict was the result of an erroneous instruction  
on the law by the court.

As the additional count, on which the plaintiff relied, was rather equivocal or ambiguous, as to what was meant by a "highway or town way" to the sea or low-water mark, we decided that public officers of a town have no power to lay out a town way between high water and the channel of a navigable river. A board of pilots may mark by bouys the best channel for vessels in a bay; but this would hardly be called a "town way on the ocean." Indeed, it did not seem to be seriously contended on the argument that the selectmen in 1683 had assumed or intended to extend a street or town way *by water* over the great ocean highway. But as the city of Boston was owner of the soil between high and low-water mark, it had equal right to reclaim the land as other owners; and having done so, a street or "town way" might be established thereon.

The court decided that, if the land was so reclaimed, and a highway laid out on it, the right to use it as a street or highway on land becomes appurtenant to the property of the adjoiners, who might well maintain an action for a nuisance on such street or highway.

The plaintiff had alleged in this count that he had received damage to his wharf by accretions of mud, &c., below low-water mark, and there was some evidence to support the allegation. The court decided that this fact should have been submitted to the jury. It was a question entirely distinct and separate from a claim of right of highway in the dock.

With this history of the antecedents of this case, there can be no difficulty in disposing of the exceptions.

The first exception is to the admission of the bills of indictment against the city. They constituted part of the history of the case, and were referred to in the testimony of the plaintiff, and were, therefore, not wholly irrelevant. They tended \* to [ \* 194 ] show "that the conduct of the city," as disclosed by the evidence, *did not* "tend to oppression," as has been charged in the argument in this court.

The next exception is to the charge of the court in their instruction, that the former verdict and judgment, though admitted in evidence, should have little or no weight on the decision of the case, because it was founded on erroneous instructions on the law. This instruction was in exact conformity with the ruling of this court. The verdict was on an agreed statement of facts, not now disputed, on which the court gave an opinion, since decided by this court to be a mistake. Like many other matters given in evidence to support a case, this verdict was received as not irrelevant,

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although the proof on the other side might show it to be worthless.

The last exception is to the charge of the court, "that there is not any evidence in the case which will authorize the jury to find that the supposed way or dock between the plaintiff's wharves, from high to low-water mark, for the free egress and ingress of boats and vessels to and from the same, as alleged and described in the seventh count in his declaration, was ever dedicated by the town or city of Boston to the public use, either as a public highway, town way, dock, or public way, for the access of boats and vessels between said wharves to high-water mark, or the egress therefrom to the sea. That there is not any evidence in the case which will authorize the jury to find that the supposed way or dock between the plaintiff's wharves, from high to low-water mark, for the egress and ingress of boats and vessels to and from the same, as alleged and described in the seventh count in his declaration, was ever duly laid out and established by the town of Boston, or the authorities thereof, pursuant to law, either as a public highway, town way, or public way, for the access of boats and vessels between said wharves to high-water mark, or the egress therefrom to the sea."

This instruction is in entire conformity with the previous decisions of this court on this subject.

There was nothing, in the opinion of this court, which should subject it to the misconstruction of having decided that a  
[ \* 195 ] \* "*town way*" for boats and vessels could be laid out on the high seas, or of imputing to the town officers such an obliquity of understanding as the assumption of such a power would argue; on the contrary, the court decided that the public officers had no such power; but that the city, after it reclaimed the land to high-water mark, might continue Summer street as a highway on land, for a nuisance, to which the plaintiff might sustain an action; and this case was remanded in order to give the plaintiff an opportunity to have the verdict of the jury on this subject; and also for any injury he might have sustained by the drains causing an accumulation of matter at the outer end of the plaintiff's wharves. The record shows that the plaintiff abandoned any claim for damages for either of these causes, and he was, of course, left without any case to be submitted to the jury.

Judgment of the circuit court is therefore affirmed, with costs.

JAMES and JOSEPH NATIONS, Plaintiffs in Error, v. NANCY ANN and  
JAMES JOHNSON.

24 H. 195.

JURISDICTION ON A WRIT OF ERROR, WITH NOTICE BY PUBLICATION.

1. As is general in this country, the proceedings on an appeal or writ of error are rather a continuation of the litigation than the commencement of a new action. Hence, where a party in whose favor a judgment or decree is rendered leaves the State, and that judgment or decree is reversed on writ of error, with service of notice only by publication, as the statute directs, the final judgment or decree is binding and conclusive on him, as in any other case.
2. Such a decree is evidence of the value of slaves at the time of the first trial and subsequently, in connection with parol testimony to the same purport.

WRIT of error to the district court for the western district of Texas. The case is fully stated in the opinion.

*Mr. Paschal*, for plaintiffs in error.

No appearance for defendants.

\* Mr. Justice CLIFFORD delivered the opinion of the court. [\* 196]

This case comes before the court upon a writ of error to the district court of the United States for the western district of \*Texas. It was a petitory suit, commenced by [\* 197] the present defendants, and was founded upon a certain final decree rendered at the April term, 1854, by the district chancery court, held at Carrollton, in the State of Mississippi, for the northern district of that State. Among other things, the petitioners allege that Nancy A. Johnson, then Nancy A. Alvis, and a minor, by her next friend, brought a suit by bill of complaint in that court against the present plaintiffs to recover three slaves belonging to her, together with hire for the same for a specified time; that she subsequently intermarried with James Johnson, who was admitted with her to prosecute the suit; that the cause was afterwards submitted to the court for a final hearing, and a decree entered dismissing the bill of complaint at the cost of the petitioners. They also allege that they prosecuted a writ of error to the high court of errors and appeals in that State, and that the decree of the district court of chancery was there reversed, and a decree entered in their favor. That decree, as set forth in the petition, shows that the appellate court was of the opinion that the slaves in controversy were the property and separate estate of the first-named complainant. Wherefore it was considered by the court that the decree of the vice chancellor ought to be reversed, and it was so ordered, adjudged, and decreed; and the court proceeding

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to pronounce such a decree as the subordinate court should have rendered, entered a decree that the complainants do have and recover of the respondents the slaves then in controversy, for the sole and separate use and right of the first-named complainant, and requiring the respondents to restore the slaves, and deliver the possession of the same to the said complainant, or her authorized agent. It is also recited in the decree that the court was of the opinion that the complainant was entitled to recover hire for the slaves from the time they were taken from her possession by the respondents. To carry out the directions of the court, it was further ordered, adjudged, and decreed, that the cause be remanded to the subordinate court, and that an account be taken of the hire of the slaves, and for such other and further proceedings as may be required in the premises. After the man- [ \* 198 ] date went down, the cause was sent to a \*commissioner to carry into effect the directions of the appellate court. He made a report, showing that on the fourth day of February, 1854, the reasonable hire for the slaves amounted to the sum of twenty-two hundred dollars; and he also reported that the hire of the slaves was reasonably worth two hundred dollars per annum. That report was confirmed by the court, and on the fourteenth day of April of the same year a decree was entered in favor of the complainants, that they do have and recover of the respondents the said sum of twenty-two hundred dollars with interest; and also, that they do have and recover of the respondents at the rate of two hundred dollars per year for the hire of the slaves, from the date of the report until they shall be surrendered up according to the decree in the cause. As a part of the decree, it was also ordered and directed that execution issue, as at law, for the amount awarded to the complainants, together with the costs of suit. Plaintiffs also allege in their petition or declaration, that those decrees or judgments were in full force, and that they have never in any manner been annulled, reversed, satisfied, or discharged, either in whole or part. Process was duly served upon the defendants in this case, and on the fifth day of December, 1854, they appeared and made answer to the suit. From the minutes of the clerk it would seem that the suit was entered, in the first place, as a suit at law, and it was certainly so treated by the defendants in their first answer. Those proceedings, however, are of no importance in this investigation, because the record states, that on the fourth day of December, 1856, the cause was docketed on the chancery side of the court; and on the second day of June, 1857, the defendants again appeared and filed their an-



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swer to the petition, without objection to the transfer which had been made of the cause. To that answer the plaintiffs excepted on various grounds, and after a full hearing the exceptions were sustained, and the answer was stricken out by the order of the court. Both parties again appeared before the court, sitting in chancery, on the 11th day of June, 1857, when, as the record states, "upon motion, and merits examined by the court, it was ordered that the cause be transferred to the law docket." No objection was \*made to that order by either party, and for aught that [\* 199] appears to the contrary, the transfer was made by consent. Leave was subsequently granted to the plaintiffs to amend their petition, and on the twenty-sixth day of January, 1858, they filed an amendment to the same, alleging that they were citizens of the State of Tennessee, and that the defendants were citizens of the State of Texas. They also alleged in their amended petition, that the slaves in controversy were of the value of three thousand two hundred dollars, and prayed judgment in their favor for the recovery of the slaves, and in default of the delivery of the possession of the same, they also prayed judgment for their value, and "for general relief."

Exceptions were filed by the defendants to the amended petition, but the exceptions were overruled by the court. At the same time the defendants filed an additional answer to the petition, denying all the allegations and charges therein contained, and also pleaded the statute of limitations in two forms, as set forth in the transcript. Afterwards, on the sixth day of February, 1858, the defendants had leave to plead *nul tiel record* to the respective decrees set forth in the plaintiffs' petition. On that issue the court found for the plaintiffs, and overruled the plea, and the parties went to trial upon the plea denying all the allegations and charges contained in the plaintiffs' petition, and upon the pleas setting up the statute of limitations. To support the issue on their part, the plaintiffs introduced duly certified copies of the two records and decrees set forth in their petition, and proved by competent witnesses the value of the slaves at the time of the trial. By that testimony it appeared that one of the slaves was of the value of eight hundred dollars, and that the other two were each of the value of nine hundred dollars. Defendants offered to prove that they removed from Mississippi on the twentieth day of January, 1850; that they became citizens of Texas, and were domiciliated there on the twenty-first day of February of that year, and that they had ever since resided there as citizens of that State. That testimony was excluded by the court upon the objection of the plaintiffs, and the

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defendants excepted to the ruling. They offered no other [ \* 200 ] evidence, and under the \*instructions of the court the jury returned their verdict for the plaintiffs. At the trial, the defendants requested the court to instruct the jury that—

1. The transcript from the record to the high court of errors and appeals, and the chancery court for the northern district of the State of Mississippi, is not evidence sufficient to entitle the plaintiffs to recover.

2. That that portion of the decree of the chancery court fixing the hire of the negroes at two hundred dollars a year, from and after the date of that decree, is no evidence of the value of the hire of said negroes; and unless the plaintiffs have introduced some evidence independent of that record, proving the value of the hire, the jury cannot allow hire from the date of the judgment rendered by the vice chancellor.

But the court refused so to instruct the jury, and did instruct them that the record was conclusive proof that the title of the slaves was in the plaintiffs, and of the value of their hire up to the fourth day of February, 1854, as shown by the record; and the jury were also instructed to return a verdict in favor of the plaintiffs for the additional hire, at the rate of two hundred dollars per annum, from the date of the decree. Instructions were also given to the jury as to the other matters of claim set forth in the petition; but inasmuch as they are not now made the subject of complaint, we shall pass the exceptions over without remark, except to say that they are evidently without merit.

On this state of the case three questions are presented for decision:

1. It is insisted by the plaintiffs in error that the court erred in charging the jury that the record offered in evidence was conclusive proof as to the title of the slaves in controversy, and of the value of their hire to the date of the decree. That theory is based upon certain facts which are apparent in the record of that suit, and the question is raised both by the instructions given to the jury and by the refusal of the court to charge as requested. It appears from the record of the suit, that the bill of complaint was filed in the district chancery court for the northern district of Mississippi [ \* 201 ] on the \*twenty-sixth day of November, 1846, and that the respondents entered their appearance on the twenty-third day of November, 1847, and made answer to the suit. Testimony was taken on both sides, and the respondents continued to prosecute their defense to the suit until the eleventh day of April, 1850, when, upon final hearing, the bill of complaint was dismissed

at the cost of the complainants. Respondents' attorney then withdrew his appearance; but the record states that the complainants, on the same day, prayed an appeal, which was granted, upon their giving bond for costs in ninety days, "and by consent it is agreed" that the appeal be taken directly to the high court of errors and appeals. Complainants, however, failed to prosecute the appeal within the appointed time, and consequently were obliged to prosecute the appeal by writ of error. It is not now questioned that a writ of error, under the circumstances of the case, was the proper process, by the law of that State, for the removal of the cause into the appellate court; but it is insisted that the subsequent decrees are void, because the respondents were not legally notified of the pendency of the writ of error. Personal service was not made on either of the respondents, and they never appeared in the appellate court. On the contrary, it appears that the attorney of the complainants, on the eighteenth day of January, 1852, filed an affidavit in the cause, that the defendants in error were not residents of the State, and that they had no attorney of record on whom process could be served. Provision, however, is made by the law of that State for service by publication in cases of this description. By the act of the twenty-ninth of January, 1829, it is provided, that "whenever a cause shall be removed to the supreme court by writ of error, and the court is satisfied that the defendant in error is a non-resident, and has no attorney of record within this State, it shall be the duty of said court to cause notice of the pendency of said cause to be published for three weeks in some public newspaper, the first of which shall be at least three months before the sitting of the next term of the court in which the case is pending, within this State; on proof of which publication, the court shall proceed to hear and determine said cause, \*in the [\* 202] same manner as if process had been actually served upon the said defendant." Hutchison's Dig. p. 931.

That regulation, by a subsequent act passed on the second day of March, 1833, is made applicable to the high court of errors and appeals, and it was conceded at the argument that the publication was made under that provision. On the filing of the affidavit, showing that the defendants in that suit were non-residents of the State, it was ordered by the court, that unless they appeared on the third Monday of October, 1853, "the court will proceed to hear and determine the cause in the same manner as if process had been actually served; and it was further ordered that a copy of the order be published in a certain public newspaper published at the capital of the State, once a week for three weeks." Publication was ac-

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cordingly made, as appears by the decree in the cause, and on the twenty-third day of January, 1854, the decree was entered reversing the decree of the subordinate court; and the question is, whether the notice was sufficient to give the appellate court jurisdiction of the case and the parties. That the subordinate court had full jurisdiction is admitted. Both of the respondents appeared in that suit, and litigated the merits for the period of three years. From the evidence in the case, it appears that they got possession of the slaves in Tennessee, in violation of the rights of the first-named complainant, and removed them to the State of Mississippi. Suit was brought against them in a subordinate court of the latter State, and after three years' litigation, and when they had succeeded in dismissing the bill of complaint, they removed to Texas, carrying the slaves with them, although they knew the complainants intended to seek a revision of the decree in the appellate court. All of the equities of the case are therefore with the present defendants. Where a court has jurisdiction it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, as a general rule, is regarded as binding in every other court. Whenever the parties to a suit, and the subject-matter in controversy between them, are within the regular jurisdiction of a court of equity, the decree of [ \* 203 ] that \*court is to every intent as binding as would be the judgment of a court of law. Accordingly, it was held by this court, in *Pennington v. Gibson*, 16 How. 65, that in all cases where an action of debt can be maintained upon a judgment at law to recover a sum of money awarded by such judgment, the like action may be maintained upon a decree in equity, provided it is for a specific amount, and that the records of the two courts are of equal dignity and binding obligation. Had the decree, therefore, been rendered in the subordinate court before the appeal, the right of the plaintiffs below to recover in this suit would have been beyond question, unless there is some other error in the record. Courts of general jurisdiction are presumed to act by right, and not by wrong, unless it clearly appears that they have transcended their powers. *Gregon's Lessee v. Astor*, 2 Howard, 319; *Voorhees v. the Bank of U. S.*, 10 Pet. 449. Notice to the defendant, actual or constructive, however, is essential to the jurisdiction of all courts; and it was held by this court, in *Webster v. Reid*, 11 How. 460, that when a judgment is brought collaterally before the court as evidence, it may be shown to be void on its face by want of notice to the person against whom it is entertained. Numerous cases, also, are cited by the counsel of the present plaintiffs, appli-

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cable to the judgments or decrees of a court exercising original jurisdiction, which assert the general rule that no man shall be condemned in his person or property without notice, and an opportunity to make his defense. And some of them go much further, and lay down the rule as applicable to the inception of the suit, that notice by publication is insufficient to support the judgment in any jurisdiction, except in the courts of the State where it was rendered. *Boswell's Lessee v. Otis et al.*, 9 How. 350; *Oakley v. Aspinwall*, 4 Comst. 513. None of these cases, however, precisely touch the question under consideration. Personal service was made upon the defendants in this case by due process of law in the court of original jurisdiction, and the question here is, whether a party duly served with notice in a subordinate court, after he has appeared and answered to the suit, and secured an erroneous judgment in his favor, may voluntarily \*absent [\* 204] himself from the jurisdiction of the appellate tribunal, so as to render it impossible to give him personal notice of an appeal, and still have a right to complain that notice was served by publication, pursuant to the law of the jurisdiction from which he has thus voluntarily withdrawn. We think not. To admit the proposition, would be to deprive the other party of all means of removing the cause to the appellate tribunal, and would enable a party, who knew he had wrongfully prevailed in the court below, to secure the fruits of an erroneous judgment, by defeating the jurisdiction of the appellate court. Actual notice ought to be given in all cases where it is practicable, even in appellate tribunals; but whenever personal service has been rendered impossible by the removal of the appellee or defendant in error from the jurisdiction, service by publication is sufficient to give the appellate tribunal jurisdiction of the subject and the person, provided it appears in the record that personal notice was given in the subordinate court, and that the party there appeared, and litigated the merits of the controversy. Contrary to the views of the counsel for the present plaintiffs, we think there is some distinction between the notice required to be given to an appellee or defendant in error and the service of process in the original suit. A writ of error is said to be an original writ, because, at common law, it was issued out of the court of chancery; but its operation is rather upon the record, than the person. Under the judiciary act, says Marshall, Ch. J., the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record, by removing the record into the supervising tribu-

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nal. Suits cannot, under the judiciary act, be commenced against the United States; and yet writs of error, accompanied by citations, have uniformly issued for the removal of judgments recovered in favor of the United States into this court for re-examination. Such cases are of daily occurrence, and the judgments are here reversed or affirmed, as they are with or without error; and it has never been supposed that the writ of error in such cases, [ \* 205 ] though sometimes \*involving large amounts, was a suit against the United States. Plainly, therefore, there is a distinction between a writ of error and the original suit. According to the practice in this court, it is rather a continuation of the original litigation than the commencement of a new action; and such, it is believed, is the general understanding of the legal profession in the United States. *Cohens v. Virginia*, 6 Pet. 410; *Clark v. Matthewson*, 12 Pet. 170.

No rule can be a sound one which, by its legitimate operation, will deprive a party of his right to have his case submitted to the appellate court; and where, as in this case, personal service was impossible in the appellate court, through the act of the defendant in error, it must be held that publication, according to the law of the jurisdiction, is constructive notice to the party, provided the record shows that process was duly served in the subordinate court, and that the party appeared and litigated the merits. Constructive notice, says Mr. Justice Baldwin, in *Hollingsworth v. Barbour et al.*, 4 Pet. 475, can only exist in the cases coming fairly within the provisions of the statutes authorizing the courts to make orders for publication, and providing that the publication, when made, shall authorize the courts to decree. *Regina v. Lightfoot*, 26 Eng. L. and Eq. 177.

As stated by this court in *Harris v. Hardeman et al.*, 14 How. 339, a judgment upon a proceeding *in personam* can have no force as to one on whom there has been no service of process, actual or constructive, and who has had no day in court or notice of any proceeding against him, judgment in that case had been rendered without any sufficient notice, either actual or constructive, and of course it was held to be irregular; but the opinion of the court clearly recognizes the principle that constructive notice in certain cases may be sufficient to bind the party. Every person, as this court said in the case of the *Mary*, 9 Cran. 444, may make himself a party to an admiralty proceeding, and appeal from the sentence; but notice of the controversy is necessary, in order to enable him to become a party. When the proceedings are against the [ \* 206 ] person, notice is served personally, or by \* publication;

but where they are *in rem*, notice is served upon the thing itself. Common justice requires that a party, in cases of this description, should have some mode of giving notice to his adversary; and where, as in this case, the record shows that the defendant appeared in the subordinate court, and litigated the merits there to final judgment, it cannot be admitted that he can defeat an appeal by removing from the jurisdiction, so as to render a personal service of the citation impossible. On that state of facts, service by publication, according to the law of the jurisdiction and the practice of the court, we think, is free from objection, and is simply sufficient to support the judgment of the appellate court. *Mandeville et al. v. Riggs*, 2 Pet. p. 489; *Hunt et al. v. Wickliff*, 2 Pet. 214.

2. It is insisted, in the second place, by the counsel of the plaintiffs, that the court erred in allowing the decree to go to the jury as evidence of the value of the hire of the slaves subsequently to the fourth day of February, 1854. That theory overlooks the fact, that testimony had been introduced by the present defendants showing the value of the slaves at the time of the trial; and that the decree was to be taken in connection with the parol testimony, showing that the slaves were still living, and in the possession of the parties originally charged with their abduction. No evidence had been offered by the defendants, and, in view of the circumstances, we think the charge was correct, and that the prayer for instruction was properly refused.

3. While the cause was pending on the chancery side of the court, on motion of the plaintiffs, the court struck out the answer of the defendants, and it is now insisted that the action of the court in that behalf was erroneous. All we think it necessary to say, in reply to this objection, is to remark that the cause was subsequently transferred to the law docket without objection, and that a bill of exceptions does not bring into this court any of the prior proceedings for revision. Whatever may be the practice in the State courts, counsel must bear in mind that there is a broad distinction between a suit at law and a suit in equity, and must understand that this court cannot and will not overlook that distinction.

\* The judgment of the district court is affirmed, with [ \* 207 ] costs.

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The Ship Sarah.

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## THE SHIP SARAH.

GEORGE R. SAMPSON and others, Appellants, v. SAMUEL WELSH and others.

24 H. 207.

## JURISDICTION ON APPEAL—AMOUNT.

Where a decree was rendered for over \$2,000 with leave to defendant to reduce it by an offset of their claim for freight, and they appeared in court and did make set-off, by reason of which a new decree was rendered against them for less than \$2,000 the right of appeal is governed by this latter decree, and is not saved by a formal statement of the defendant that he does not waive his right of appeal by making the set-off.

THIS is an appeal from the circuit court for the eastern district of Pennsylvania. The case is sufficiently stated in the opinion.

*Mr. Wharton* and *Mr. Kane*, for appellants.

*Mr. Fallon* and *Mr. Serrill* for appellees.

Mr. Chief Justice TANBY, delivered the opinion of the court

This case is brought up by an appeal from the circuit court of the United States for the eastern district of Pennsylvania.

A libel was filed in the district court for that district by S. & W. Welsh, the appellees, against the ship Sarah, (of which Sampson & Tappan, the appellants, are the owners,) to recover compensation for damages sustained by a cargo of coffee shipped on board the Sarah, at Rio, and consigned to the libelants; and [ \* 208 ] also to recover compensation for sundry \*disbursements made by the libelants for the payment of wages and provisions for the ship.

The ship owners appeared, and answered; but it is unnecessary to state more particularly the facts in controversy between the parties, because the final decree of the circuit court was for less than two thousand dollars, and consequently no appeal from its decree will lie to this court.

At the hearing in the district court the libel was dismissed; but upon an appeal to the circuit court this decision was reversed, and a decree passed by the circuit court in favor of the libelants for the sum of \$2,302.78, with leave to favor the respondents to set-off the balance due them for freight, if they should elect to do so. Afterwards, the respondents appeared in court, and elected to set-off this balance against the sum decreed against them, which reduced the amount to \$1,071.27. But in making this election, the proctors for the respondents stated in writing, and filed in the court,



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that the election to set-off was made without any waiver of their right to appeal from the decree. After this election was made, the court, on the 31st of August, 1858, passed its decree in favor of the libelants for the above-mentioned sum of \$1,071.27, with interest from July 20, 1858. This was the final decree of the court, and the one from which the appeal is taken; and, as it is below \$2,000, no appeal will lie under the act of Congress. And neither the reservation of the respondents in making their election, nor even the consent of both parties, if that had appeared, will give jurisdiction to this court where it is not given by law.

The appeal must therefore be dismissed for want of jurisdiction.

SUSAN VIGEL, Plaintiff in Error, v. HENRY NAYLOR, Administrator, &c.

24 H. 208.

EVIDENCE—STATUS OF SLAVE MOTHER—EVIDENCE OF A CHILD.

1. In a suit by a slave for freedom, a record of a former suit between the mother of the plaintiff and the present defendant establishing the freedom of the mother is competent evidence.
2. This is rendered more presumptive by parol testimony showing that the mother and child, when young, were in the possession of defendant, and were carried from the house of Kirby, by whose will all his slaves were manumitted, and under which the mother received freedom.

WRIT of error to the circuit court for the District of Columbia.  
The case is well stated in the opinion.

*Mr. Blair*, for plaintiff in error.

*Mr. Bradley*, for defendant.

\* Mr. Justice CATRON delivered the opinion of the court. [ \* 209 ]

Susan Vigel sued Henry Naylor, administrator of George Naylor, by a petition for freedom in the circuit court of this district. He pleaded that she was his slave. On the trial of this issue, she offered in evidence the will of John B. Kirby, by which all his slaves over thirty-five years of age were emancipated; and all those under that age were to be emancipated—the males at thirty-five, and the females at thirty years of age. This was allowed by an act of the legislature of Maryland of 1796, ch. 67, sec. 13.

A witness testified on the petitioner's behalf, "that a few days after the death of Kirby, which took place in 1828, George Naylor brought to his house, where witness was then at work, the peti-

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tioner, her mother, and her sister ; and said George Naylor stated to the witnesses at the time, that he had brought said negroes from the residence of said Kirby ; and that the petitioner was then between six and eight years of age."

The petitioner then offered to prove that her brother Richard, and her mother Sarah, and her sister Eliza, had obtained [ \* 210 ] \* their freedom under the will of Kirby ; that Sarah, the mother, and Eliza, had recovered their freedom by suits brought against George Naylor, which were defended by him. In the one instituted by Sarah, judgment was rendered in 1838 ; and that brought by Eliza was decided in her favor in 1842. The petitioner also offered to prove that it is very unusual for children of the age of the petitioner at the time of Kirby's death to be separated from their parents ; but the court excluded the testimony offered from the jury ; to which exception was taken.

The defendant then proved by two witnesses, that they had known the petitioner from her birth, and that she was born the property of George Naylor ; and that she never was out of his possession, or that of his successor and administrator. It is objected that no records of the verdicts and judgments were offered to prove the recoveries. The bill of exceptions states, generally, that she offered to prove the facts, but the court refused to hear the evidence.

Transcripts of the records being the best evidence, and their production necessary, it is manifest that the offer to prove the recoveries was not refused for the reason that the record evidence was absent, but because the recoveries were deemed irrelevant, or that they were *inter alios acta*, and therefore incompetent as proof in the cause for any purpose. And the first question is, was the evidence offered relevant, when taken in connection with the parol evidence.

The girl was six or eight years old when George Naylor brought her home in 1828, with her mother and sister, from the late residence of Kirby, the testator. It was offered to be proved, and we must take it to be true, that it could have been proved that it was unusual to separate the mother from the slave-child as young as the petitioner was at the time Kirby's will took effect.

If Sarah, the mother, Richard, the brother, and Eliza, the sister, were the slaves of Kirby at his death, and acquired their freedom under his will, does this circumstance furnish evidence from which a jury might infer, in connection with other evidence, that [ \* 211 ] the petitioner was also the slave of Kirby when \* he died, and entitled to her freedom on arriving at thirty years of age? It is immaterial whether the evidence offered and rejected

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was weak or strong to prove the fact. The question is, was it competent to go to the jury? *Castle v. Bullard*, 22 How. 187. If so, it was for them to judge of its force and effect. If this child had been only one year old or under when Naylor got possession of her and of her mother, and other children in company with her, the presumption would be stronger, that her condition and that of her mother was the same, and both the slaves of Kirby, and were manumitted by his will.

By the rejection of the evidence the case was stripped of all proof that Susan, the petitioner, ever belonged to Kirby, the testator; whereas, had it been admitted, it would have proved that Susan's mother, and her other children, belonged to the estate of Kirby after his death, and were emancipated by his will; and having emancipated *all* his slaves, a presumption could have been founded on this proof by the jury, that an infant child of the same family was the slave of Kirby also, especially as Naylor brought the slaves as a family from Kirby's late residence.

2. Was the record of the judgment *inter alios acta*, and therefore incompetent?

In the case of *Davis v. Wood*, (1 Wheat. 6,) it was held by this court that a judgment in favor of the mother establishing her freedom against Swan, a third person, could not be given in evidence in a suit by the child of that mother as tending to prove his freedom. On the trial below, the petitioner offered to prove by witnesses, that they had heard old persons, now dead, declare that a certain Mary Davis, now also dead, was a white woman, born in England, and such was the general report in the neighborhood where she lived; and further offered to prove by the same kind of testimony, that Susan Davis, the mother of the petitioner, was lineally descended in the female line from the said Mary; which evidence by hearsay and general reputation the court refused to admit, except so far as it was applicable to the fact of the petitioner's pedigree. And the ruling below this court affirmed.

\* There is no question arising in the cause before us in- [\* 212] volving the consideration to what extent hearsay evidence to prove the status of freedom is admissible, and therefore we refrain from discussing the first point decided in *Davis v. Wood*. In that case, Susan, the mother of John, was sold by Wood, the defendant, to Caleb Swan; and she and her daughter, Ary, who had likewise been sold, sued Swan for their freedom, and recovered it. This record of recovery was offered in evidence on behalf of John, but was rejected on the trial.

This court held, that "as to the second exception, the record was

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not between the same parties. The rule is, that verdicts are evidence between parties and privies. The court does not feel inclined to enlarge the exceptions to this general rule, and therefore the judgment of the court below is affirmed."

This is the judgment with which we have to deal. The difference in the case under consideration and the one found in 1 Wheat. is, that here Susan's mother and sister recovered their freedom from Naylor, he being the defendant in both actions. There the mother and daughter recovered their freedom from Swan, who had purchased them of Wood.

This court having cut off all evidence by hearsay and general reputation—1st, that the female ancestor of the petitioners was a white English woman, and free; and 2d, that the record of the recovery of freedom by John's mother and sister from Swan was incompetent—of course the petitioner had to go out of court, having proved no case.

There the verdict was not between the same parties. Here the suit was between George Naylor and the mother of Susan; as between the mother and Naylor, the verdict was conclusive of her right to freedom; and Susan, the child, was a privy in blood to the mother, (being her heir, if free,) and as such heir, comes within the rule laid down in *Davis v. Wood*, and could avail herself of that verdict as equally conclusive, if she could further prove that she was born after the impetration of the mother's writ. *Alexander v. Stokely*, 7 Sergt. and R. 300; *Pegram v. Isabell*, 2 Hen. and M.; *Chancellor v. Milton*, 2 B. Monroe, 25. Or, if she could prove that she was born after Kirby's death, and that her [\* 213] mother recovered her freedom \* under his will—and which facts might have been established by further proof—these circumstances could be let in as additional evidence. 2 Henning and M. 211.

Owing to the lapse of time since Mr. Kirby died, the petitioner sought to establish her case by circumstantial evidence. It was rejected; for what particular reason, does not appear.

As already stated, we think the evidence offered had weight enough in it to be pertinent, and ought therefore to have been submitted to the jury. 23 How. 187.

How it was proposed to be proved that Richard was a free man, and acquired his freedom under the will, does not appear; but as to Eliza, the sister, a record of recovery by her of her freedom against Naylor was offered as evidence, and rejected. The record could have proved the existence of the verdict and judgment as a FACT, and the legal consequences flowing from the fact, namely,

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that the petitioner Eliza, was a free person. As to George Naylor and his representative, her status of freedom is a conclusive fact. And what is the effect of the record as respects other persons? Eliza sued George Naylor, declaring that she was free. He replied that she was his slave. She had a verdict that she was free. By the verdict and judgment, she took to herself all Naylor's title; it was *vested* in her as Naylor had it. *Harris v. Clarissa*, 6 Yerger's Ten. R. 243. He had had her in possession twelve years, and had title by the act of limitations of six years, as to other contestants who might set up claim to her as a slave. She can rely on his title as if he had manumitted her; the record has this effect. It stands on the footing that a recorded deed of manumission to her from Naylor would stand, or that a recorded bill of sale from him to a purchaser would stand. In either case, the title-paper could be given in evidence to prove the title; and the title thus acquired must be deemed valid until some one else legally establishes a better. This record evidence may be used in any suit by a third person, where the evidence is pertinent, of which the court must judge from facts and circumstances appearing on the trial; and to this effect are the adjudications of the State courts generally. *Pegram v. Isabell*, in Virginia, 2 Hen. and M. 210; *Alexander v. Stokely*, 7 Sergt. \* and R. 290, in Pennsylvania; *Vaughan v. Phebe*, [\* 214] *Martin and Y. R. 6*, in Tennessee; *Chancellor v. Milton*, 2 B. Monroe's R. 25, in Kentucky. In Maryland, no decision is found on the subject.

In the next place, the record operates on the *status* of the person; it sets him free or pronounces him a slave, and binds him by the verdict either way. *Shelton v. Barbour*, 2 Wash. Va. R. 82.

In some of the States, the suit may be in equity, and the status of freedom be established by a decree. *Fisher's Negroes v. Dobbs et al.*, 6 Yerg. 119; *Reuben v. Paraish*, 6 Humphrey's R. 122.

It is ordered that the judgment of the circuit court be reversed, and the cause remanded for another trial.

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MIGUEL DAVILA, Plaintiff in Error, v. DAVID AND JESSE MUMFORD.

24 H. 214.

TEXAS LAND TITLES—LIMITATION.

1. Any defect in the power of Steele to act as commissioner in the colony of Nashville or Robertson has been cured by the statute of 1841 of the republic of Texas.
2. The phrase, "want of intrinsic fairness and honesty," in the 15th section of the act of limitations of the State of Texas, has relation to defects in the chain of title of defendant set up as color of title, and not to a knowledge on the part of defendant of the existence of a superior title.

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WRIT of error to the district court for the western district of Texas. The case is sufficiently stated in the opinion.

*Mr. Hale*, for plaintiff in error.

*Mr. Ballinger*, for defendants.

[ \* 221 ] \*Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the district court of the United States for the western district of Texas.

The suit was brought against the defendants and others to recover the possession of eleven square leagues of land, situate in what was formerly known as the county of Milam, on the right bank of the river San Andres, otherwise called Little river, where Buffalo creek and Donaho's creek enter said river, with specified boundaries.

The plaintiff gave in evidence a grant from the government of Coahuila and Texas, within the limits of the colony of the empresarios, Austin and Williams, dated 18th October, 1833, and rested.

The defendants gave in evidence grants from the same government of a league each, situate within the boundaries of the eleven leagues, the one to David Mumford, dated 20th March, 1835, the other to Jesse Mumford, dated 25th February, the same year; the former went into possession in the spring of 1844, and continued in the possession and cultivation of the tract down to the time of trial; the latter took possession in the year 1850, and continued the cultivation and improvement down to the trial.

The defense relied on is the statute of limitations.

The court charged that the plaintiff and defendants both claimed under titles emanating from the sovereignty of the soil; that the plaintiff's was the elder in point of date, and must be regarded as paramount, unless the defendants were protected by the statute of limitations set up in defense. That if the jury believed from the evidence the defendants had held actual adverse and peaceable possession, in their own right, for more than three years next before the commencement of the suit, under color of title, and that the plaintiff's cause of action accrued more than three years prior to the suit, the jury should find for the defendants.

The court further charged, that if the jury believed from the evidence that the defendants had held actual adverse and peaceable possession in their own right, cultivating, using, and enjoying the lands, and paying taxes thereon, and \*claiming under a deed or deeds duly recorded, for more than five years next before the commencement of the suit, they should find for the defendants.

The 15th section of the act of limitations of Texas provides, "that every suit to be instituted to recover real estate as against him, her, or them, in possession, under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterwards;" and provides that, "by the term *title*, as used in this section, is meant a regular chain of transfer from or under the sovereignty of the soil; and *color of title* is constituted by a consecutive chain of such transfers down to him, her, or them, in possession, without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty."

The principal ground taken against the operation and effect of the three years' limitation in the present cause is, that the elder title being on record, the defendants had constructive notice of the same at the time of the grants to them, and hence that the title is subject to the charge of the "want of intrinsic fairness and honesty" within the meaning of the statute, which it is claimed removes the bar of three years' adverse possession.

It is admitted that this clause of the statute has not yet received a construction by the courts of Texas, and there is certainly some difficulty in ascertaining the precise meaning intended by the legislature from the phraseology used. The better opinion, we think, is, that the want of intrinsic fairness and honesty, in the connection in which the words are found, relates to some infirmity in the muniments of title, or deduction of title, of the defendant, indicating a want of good faith in obtaining it.

The statute, in defining what is intended by possession, "under title, and color of title," in order to operate as a bar within the three years, declares, that by the term "title" "is meant a regular chain of transfer from or under the sovereignty of the soil," which, as is apparent, is the case before us, \*the [\* 223] title of the defendants being directly from the government; and "color of title" is declared to be "a consecutive chain of such transfer down to him, her, or them, in possession, *without being regular*, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty;" clearly referring, as we think again, to the muniments of the title, and defects therein.

To refer these words to a constructive or actual notice of an elder title would, in the practical effect of the limitation, be a virtual

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repeal of the statute, especially in all cases in which the elder title is of record.

A statute of limitations is founded upon the idea of an elder and better title outstanding, and prescribes a period of possession and cultivation of the land, under the junior or inferior title, as a bar to the elder, for the repose of society; thereby settling the title by lapse of time, and preventing litigation.

As it respects the five years' limitation, the objection is, that the grants were not duly registered, and hence the possession not within the 16th section of the act. The grant to David Mumford was registered on the 21st July, 1838, and that to Jesse on the 4th October of the same year.

It is insisted, however, that the registries were a nullity, on the ground that the execution of the grants had not been properly proved or acknowledged, in order to be admitted of record.

In the case of the grant to David, the recorder certifies that the deed was presented to him, proven, and duly recorded in his office the day above mentioned; and in that of Jesse, that the deed was proved for record by J. B. Chance, who made oath that he was familiar with the handwriting of the commissioner, W. H. Steele, and also of the assisting witnesses, and that he believed the several signatures to be genuine.

There is some difficulty in determining, from the various decisions of the courts of Texas upon the registry act of 1836, whether or not the certificates of proof of the grants in the present [ \* 224 ] case were sufficient to permit them to registry at the \* time they were filed for record. It is claimed for the defendants that the recording of the grants was confirmed by the act of 1839, which provided that "copies of all deeds, &c., when the originals remain in the public archives, and were executed in conformity with the laws existing at their dates, duly certified by the proper officers, shall be admitted to record in the county where such land lies." This act relates to the colonists' titles delivered to the grantee, the originals remaining as public archives. The deeds in the present case are copies of the originals remaining in the archives, and are certified by Steele, the commissioner, that they agree with the original titles which exist in the archives, from which they are taken for the parties interested, the day of their date, in the form provided by the law. In addition to this certificate, the copies, which it seems are executed by the commissioner, and are second originals, were proved before the recorder at the time they were admitted to registry. But be this as it may, we are not disposed to look very critically into the question of the



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registry, though we cannot say the court was in error in respect to it, inasmuch as the defense was complete under the statute of three years' limitation, as already explained.

An objection has been taken that the grants of the defendants are a nullity, upon the ground that Steele, the commissioner, had no authority to act in that capacity in the colony of Nashville, or Robertson, at their date. But this defect was cured by the act of the republic of Texas in 1841, as has been repeatedly held by the courts of Texas. (2 Tex. R. 1 and 37; 9 *ib.* 348, 372; 23 Tex. R. 113 and 234; 22 *ib.* 161 and 21; *ib.* 722; 20 How. R. 270.)

The judgment of the court below affirmed. •

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JAMES A. CHANDLER, Plaintiff in Error, v. OTTO VON ROEDER and others.

24 H. 224.

COURT AND JURY—EVIDENCE—TEXAS LAND LAW.

1. Where, assuming that all the testimony adduced by one or the other party is true, it does or does not support the issue in which it was offered, it is the duty of the court to declare this clearly and directly, and a refusal to do so is error.
2. Hence, when, under the Texas statute of limitation, the documentary evidence offered to show color of title was fatally defective, in showing no pretense of derivation from government, it was the duty of the court to instruct the jury that no such color of title had been shown as would support the plea of the statute.
3. The statute of 13th Elizabeth, concerning fraudulent conveyances, is in force in Texas; and it was error in the court to refuse to admit evidence that the deed under which defendant held was made in fraud of creditors, plaintiffs themselves being creditors.

WRIT of error to the district court for the western district of Texas. The case is stated in the opinion.

*Mr. Paschal*, for plaintiff in error.

*Mr. Hale* and *Mr. Robinson*, for defendants.

\*Mr. Justice CAMPBELL delivered the opinion of the court. [ \* 225 ]

The plaintiff claimed in the district court a league of land in the county of Fayette, originally granted by the Mexican government to William H. Jack, and which was in the possession of the defendants. His title consists of a record of a suit in one of the district courts of Texas, in favor of Bremond and Van Alstyne against a number of persons associated under the name of the German Emigration Company, founded upon notes and bills of the

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company, dated in the years 1846 and 1847, and upon which judgment was recovered in 1852.

An execution was issued upon this judgment, and a levy, sale, and conveyance of the property in controversy were made in 1853, according to the exigency of the writ. The plaintiff was [ \* 226 ] \* the purchaser at the sale. There was testimony conducing to prove that Von Roeder entered upon the land as the agent of the company. The defendants, in their answer, denied the sufficiency of this title, and pleaded that they had had adverse and peaceable possession of the land for more than five years under title, or color of title, derived from the sovereign authority, thus claiming the benefit of the 15th and 16th sections of the act of limitations. Hartley's Dig. arts. 2391, 2392.

The title exhibited on the trial by the defendants consisted of a deed purporting to be made by the German Emigration Company, through an attorney, Gustavus Dressell, in the year 1848, in favor of the defendant, Von Roeder, in which this and other property was conveyed to him, and deeds from Von Roeder to the co-defendants dated in 1850, and that the defendants had had adverse possession under them. There was not five years from the date of the deed to Von Roeder to the commencement of the suit, and there was no testimony to show in what manner the German Emigration Company had become entitled to the property. No conveyance from William H. Jack, the original grantee, was produced either to the company or to the defendants. Thus the pleas of the statute of limitations were not proved. The plaintiff's counsel requested the court to instruct the jury that there is no documentary evidence, title, or color of title, to support these pleas of the defendants. The court declined to advise the jury as requested, but after informing them of the nature of the title and possession that would support such pleas, directed the jury to inquire whether the defendants had adduced sufficient evidence to sustain them. The entire case, in so far as these pleas were concerned, was contained in written documents and undisputed facts. It is the duty of the court to determine the competency of evidence, and to decide all legal questions that arise in the progress of a trial, and consequently, when, assuming that all the testimony adduced by the one or the [ \* 227 ] other party is true, \* it does not support his issue, its duty is to declare this clearly and directly. Whether there be any evidence is a question for the judge; whether there be sufficient evidence is for the jury.

*Company of Carpenters v. Haywood*, Doug. 375.

*Jewell v. Parr*, 13 C. B. R. 909.

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The court erred in refusing to instruct the jury as requested, and in submitting the decision of questions when there was no evidence to raise them. The defendants having introduced their title, the plaintiff proposed to produce testimony of a variety of circumstances to show that the possession of the property by Von Roeder was collusive and fraudulent, and that the deed was made to him with the intent to defraud and delay the creditors of the German Emigration Company, who were insolvent.

The court overruled this attempt of the plaintiff, and excluded all testimony to establish fraud or collusion. The statute of the 13th Elizabeth concerning fraudulent conveyances has been adopted in Texas. The supreme court of that State have decided that when a deed is a mere pretense, collusively devised, and the parties do not intend other than an ostensible change of the property, the property does not pass as to creditors; and even when the parties intend an irrevocable disposition of the property, but the conveyance has been made with the intent to defraud creditors, that the conveyance is void.

Baldwin v. Peete, 22 Texas R. 708.

This decision conforms to the current doctrine relative to the just construction of this statute. The plaintiff proposed to prove that the deed to Von Roeder was fraudulent within the meaning of the act. The bills and notes upon which the judgment was founded were filed as part of the record, and are certified with the judgment of the district court.

These show that the plaintiffs in the suit were creditors at the date of the conveyance to Von Roeder, and within the protection of the statute of frauds.

Without considering the particular testimony offered, it is \*our opinion that the district court erred in refusing [ \* 228 ] to receive evidence to impeach the deed for fraud.

The plaintiff objected to the introduction of the deed to Von Roeder as testimony, because it was not shown that there was such a corporation as the German association, and because a letter of attorney to Dressell was not exhibited. The deed was admissible, because it appeared that the defendants held their possession under it. But whether it was sufficient evidence of title in the German Emigration Company, or of transfer to the defendants, were questions which it was competent to the court to determine in its instructions to the jury. It appears from the charge that the decision of the court was favorable to the plaintiff. He, consequently, has no cause for complaint upon his exceptions to the competency of the evidence.

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The Steamboat Doctor Robertson.

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For the errors we have noticed the judgment of the district court is reversed, and the cause remanded for further proceedings.

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## THE STEAMBOAT DOCTOR ROBERTSON.

THE NILES WORKS, Appellants, v. JESSE W. PAGE, and others.

24 H. 228.

## ADMIRALTY—COLLISION.

A steamboat ascending and a loaded flat-boat descending collide in the day time in the middle of the Ohio river, having been in full view of each other for a mile and a half: Held, that it was the duty of the steamboat to have kept out of the way, and the flat-boat cannot be held in fault for floating with the current without using her oars to avoid collision, unless it was shown very clearly that she could safely and successfully have done so after the danger of collision became apparent. Those in control of her had a right to suppose that the steamboat would take measures to avoid a collision.

APPEAL from the circuit court for the district of Kentucky. The case was a libel in admiralty by appellants for a collision, the facts of which are stated in the opinion. The district court dismissed the libel and the circuit court affirmed that decree.

*Mr. T. D. Lincoln*, for appellants.

*Mr. Phillips* and *Mr. Nicholson*, for appellees.

[ \* 229 ] \* Mr. Justice McLEAN delivered the opinion of the court.

This is a libel filed by Christopher G. Pearce *et al.*, incorporated and acting under the name of "Niles Works," and by virtue of the statute of the State of Ohio, passed May 1, 1852, entitled "An act to provide for the creation and regulation of incorporated companies in the State of Ohio," against the steamboat Doctor Robertson, her tackle, apparel, engine, and furniture, and all persons intervening for their interest in the same, in a cause of collision, civil and maritime.

The libelants were the owners of a large amount of iron castings, made for and intended as sugar-mill machinery, which was at the time of the said collision in a flat-boat, well manned and equipped, and which was being navigated on the Ohio river, and in the usual mode of navigating such craft, and near the Illinois shore, and along the side of the Cincinnati tow-head, about twenty-five feet therefrom, and had crossed over from the Kentucky side, and was at the time in full view of the Doctor Robertson and her pilot.

The libel states that on the eighth day of August, 1856, at about

eight o'clock in the forenoon of that day, and while the said flat-boat was being navigated as aforesaid, the said steamboat Doctor Robertson approached her, coming up the river, and having a lighter in tow, with full speed; and although the flat-  
 \*boat was in full view of her pilot, and there was ample [ \* 230 ] room for the said steamboat to pass to the left of, and between her and the Cincinnati bar, which lay between the flat-boat and the Illinois shore, yet the said steamboat endeavored to run between the said flat-boat and the said tow-head, and ran herself and the said lighter with great force directly into and upon the said flat-boat, and broke in the sides thereof, and caused the flat-boat immediately to sink in about twenty feet of water, and so injured it as to render it entirely useless.

It happens in this case, as in all other cases of collision, that the witnesses on the respective boats are somewhat contradictory in their statements. It is admitted, that in ascending the Ohio river, some fifty or sixty miles below Cincinnati, the steamboat Doctor Robertson, a stern-wheel boat, of fifty tons burden, in passing up the river, near the place called the Cincinnati tow-head, while running close to the Kentucky shore, being from one or two miles below, in full view of the defendants' flat-boat, which was freighted with sugar-mills, and other machinery, for the western trade; and that the flat-boat, being put in the course of the current, floated down the river, her stern and front oars not in use, but laid on the boat, without any effort by the hands on the flat-boat, continued to float with the current, until it came into collision with the ascending steamboat. That this boat, to avoid a snag that projected some distance into the river, changed her course, by which means she came into collision with the flat-boat, which was immediately sunk in water near fifteen feet deep.

There seems to have been little or no effort made to avoid this collision by those who had command of the flat-boat. There were two other flat-boats lashed together, which followed the first boat at a distance of some two or three hundred yards; and they, perceiving that a collision was likely to occur, used their oars, so as to avoid the ascending steamboat. Under this state of facts, the question of fault arises.

The defendants' flat-boat was ninety-six feet in length, and some ——— feet in breadth, with an oar or sweep in the front and rear parts of the boat, so that some direction might be given to it. But this movement cannot be relied on when  
 \*the colliding boats are near to each other. The flat- [ \* 231 ] boat was heavily laden, and occupied near a hundred feet

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The Steamboat Doctor Robertson.

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in a somewhat rapid current, and the only means of removing it out of the direction of the steamboat was, by working the end oars across the current. This could not be done successfully, unless the boats were so far apart, as by a diagonal movement to secure the aid of the current in escaping a collision.

But what is the law of the river on this subject, in regard to floating flat-boats and steam vessels? The self-moving power must take the responsible action. This cannot always be done, even with a fair wind, by a sailing vessel, as it may suddenly change, or be subject to accident. But steam is generally under the control of the will of the engineer, and he is responsible for a proper use of it.

Schuyler C. Barnet says he was a passenger on the Doctor Robertson, and that five or six miles below Shawneetown she came in collision with a flat-boat, loaded with sugar-mill machinery, at about nine or ten o'clock of a clear morning; the flat-boat had come over the reef, and had straightened down the river, and was about one hundred feet from the tow-head, the witness sitting half an hour on the boiler deck of the steamer before the collision, the steamer running about fifty feet from the Kentucky shore, on the larboard side; she had a lighter in tow, and when she approached very near the flat-boat she turned out a little from the shore to avoid a snag just above her, but kept on until the lighter struck the flat-boat, when the bow of the steamer was some fifty or sixty feet below the tow-head; the lighter struck the flat-boat, and ran half-way over it, which caused the flat-boat to sink.

And the witness says, that on the part of the flat-boat nothing could have been done, as she was lying in the best possible position. Since 1824, the witness states, he has been boating on the river, and that the general custom has been, and now is, "for steamboats to give the way for flat-boats to pass."

Alexander Ford has been on the river ten or twelve years, and a pilot for three years. The flat-boat was lying nearly straight with the tow-head, about one hundred and fifty yards, [\* 232] \*more or less, above the foot of it, and about twenty-five or thirty yards from the Kentucky shore. The Doctor Robertson aimed to go on the starboard side of the flat-boat, when the barge which the Robertson had in tow struck the flat-boat, and sunk her. He thinks the Robertson had stopped her engine, which, if it had been done in time, the boats would not have come together. He says there was plenty of room to pass outside of the flat-boat. The witness says "that he supposed the Robertson could pass on either side of the flat-boat. The flat-boat was not easily turned out of line. The boats in approaching each other were in full view

a mile and a half. It is customary for a steamboat to give way to a flat-boat. The steamboat takes either side of the descending flat-boat, so as to avoid it. Ford's boat was from seventy-five to one hundred and twenty-five yards above the machinery boat when he perceived that the steamboat would run into the flat-boat."

The witnesses generally concurred in saying, that the steamboat could have run to the Kentucky shore until the flat-boat had passed, or could have run on the Illinois side of the flat-boat. In the language of John Walker, a witness, "the steamboat could have either gone to the shore or run closer to the shore, or she might have gone entirely outside of the flat-boat; and he does not think those persons on the flat-boat could have done anything to have prevented the collision." Witness thinks there was one hundred to one hundred and fifty yards of river on the Illinois side.

William P. Lameth, for the last fifteen years, has acted as steamboat captain, and he says, "it is the usual custom for steamboats to examine the position of the flat-boats, and to take the best possible course to avoid them, on either side that seems best. If danger is apprehended, it is usual to ring a slow bell, and run easy. If danger be apparent, the boat should land or stop entirely, and let the flat-boat pass."

John F. Farrell says, "it is the duty of a flat-boat to straighten itself in the river, ease its oars, and pursue the course with the current, and the steamboat must avoid her." The snag in the river, Douglass says, was one hundred feet above the bow of the steamer when the boats struck. The \* two other flat-boats [ \* 233 ] were, when the steamer struck the flat-boat, one hundred and fifty yards above the colliding boats, and the witness, Douglass, thinks the steamboat could have passed, if all the flat-boats had kept their places. The stern of the flat-boat was sixteen feet under water.

Several witnesses called by the steamer seem to think that the flat-boat was bound to avoid the steamer; but such a rule would be unreasonable, and would increase the risk of navigation. When a floating boat follows the course of the current, the steamer must judge of its course, so as to avoid it. This may be done by a proper exercise of skill, which the steamer is bound to use. Any attempt to give a direction to the floating mass on the river would be likely to embarrass the steamer, and subject it to greater hazards. A few strokes of an engine will be sufficient to avoid any float upon the river which is moved only by the current; and this, I understand, is the established rule of navigation.

We think the steamer was in fault in not avoiding the flat-boat, on which ground the judgment of the circuit court is reversed.

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Thompson v. Roberts.

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WILLIAM THOMPSON and JOHN PICKELL, Plaintiffs in Error, v. LEWIS ROBERTS and others.

24 H. 233.

RES ADJUDICATA—FORMER JUDGMENT CONCLUSIVE.

1. A decree in chancery in a foreclosure suit, in which want of consideration and fraud in the original contract is set up, and the decree is against the defense, is a good answer to the same defense in a suit at law on the notes secured by the mortgage between the parties to the chancery suit.
2. It is no objection to the decree as evidence that there were other parties to the chancery suit who are not parties to the present suit, provided the fact was decided as between the present parties.
3. That the court submitted to the jury the question whether the same defense was set up in the chancery suit, instead of instructing them that it was the same defense, is no error to the prejudice of the defendants, the plaintiffs here, and can be no ground for reversing the judgment.

WRIT of error to the circuit court for the district of Maryland.  
The case is fully stated in the opinion.

*Mr. Mayer* and *Mr. Yellott*, for plaintiff in error.

*Mr. Alexander*, for defendants.

[ \* 239 ] \* Mr. Justice GRIER delivered the opinion of the court.

The defendants in error were plaintiffs below, and brought this suit as endorsees of two notes given by the plaintiffs in error to William H. Smith. These notes were given in part payment of some tracts of coal land sold and conveyed to Thompson and Pickell by Smith, and the defense endeavored to be established on the trial was a want of consideration, in that Smith had falsely represented the lands to contain 300 acres of "big-vein" coal, when in fact they contained but 150 acres. A mortgage had been given to secure these notes; a bill had been filed in chancery to foreclose this mortgage, in which Smith, the assignor, and Roberts and others, the equitable assignees of the mortgage, and endorsees of these notes, were complainants, and Thompson and Pickell, together with their assignees, the Pickell Mining Company, were respondents. They put in a joint and several answer admitting the execution of the notes and mortgage, and alleging as a defense the representations made by Smith, by which Thompson and Pickell were induced to purchase the lands, supposing them to contain 300 acres of the "big-vein" coal, when in fact, as they afterwards discovered, the land contained but 150 acres of the same. For this reason, and "because they did not receive a valuable con-



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sideration for said notes or mortgage, respondents aver that plaintiffs are not entitled to demand payment for them, or any part of them, but the same are to be regarded as absolutely void."

This case was fully heard by the chancellor on the pleadings and evidence, who overruled the defense set up, and decreed a sale of the mortgaged premises. The record of that case was put in evidence on the trial of this case by the defendants \*be- [ \* 240 ] low, for the purpose, as they alleged, "of showing that the plaintiffs were not holders for value."

They offered for that purpose a part only of the record. Whereupon the plaintiffs gave in evidence the entire record, and insisted that the decree is conclusive, and estops the defendants from again alleging the same matter as a defense to the suit at law on the notes. The evidence was, however, again presented to the jury, without a waiver of plaintiffs' right to treat the decree as an estoppel.

The court rejected a number of prayers offered by each party, and gave the following instruction to the jury, which is the subject of exception :

"If the jury shall find from the evidence that the promissory notes offered in evidence in this case were duly executed and delivered by the said defendants to William H. Smith, and by him endorsed over to the said plaintiffs for value ; and that in the cause on the equity side of this court, in which the said plaintiffs, with the said Smith, were complainants, and the said Thompson and Pickell, with the Pickell Mining Company, were defendants, (the record of which has been offered in evidence,) the same defense was made and set up in said cause to prevent the passage of a decree for the sale of the said lands to pay the said notes as is now made to prevent a recovery in this case, then the decree passed in that case is conclusive upon the point of this defense, and the plaintiffs are entitled to recover in this action."

The plaintiffs in error have not called in question the correctness of the general principle of law assumed by the court below, viz: "that the judgment of a court of law, or a decree of a court of equity, directly upon the same point, and between the same parties, is good as a plea in bar, and conclusive when given in evidence in a subsequent suit."

But it is objected to this instruction, that it submits as a question of fact to the jury what ought to have been decided by the court as matter of law from the face of the record produced. This, if an error, was one favorable to the plaintiffs in error, as it gave them the chance of a verdict on a point which, if decided by

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[ \* 241 ] the court, must have been decided against \* them; for the record shows conclusively that the very same defense against these notes was the only point in dispute in the court of equity, to wit, whether plaintiffs in error were "*deceived by*" the alleged misrepresentations of Smith, fraudulent or otherwise, and whether the notes were therefore "without consideration," and "absolutely void."

The objection that the parties were not the same in both suits cannot be sustained.

Both parties to this litigation were parties in that suit; the subject-matter was the same; the defense now set up was the same which the pleadings and the evidence show to have been adjudicated in the court of chancery.

It is true, Smith, who endorsed the notes to the plaintiffs below, and who was interested in the question, was joined as complainant, and the Pickell Mining Company, who had purchased the mortgaged property, were made respondents, according to the practice in courts of chancery, where all parties having an interest in the question to be tried are made parties, that the decree may be final as to all matters in litigation. No good reason can be given why the parties in this case, who litigated the same question, should not be concluded by the decree, because others having an interest in the question or subject-matter were admitted by the practice of a court of chancery to assist on both sides.

The question as between the present parties is *res judicata*, and none the less binding because others are concluded also. A contrary doctrine would sacrifice a wholesome principle of law to a mere technical rule having no foundation in reason; making a distinction where there is no difference.

Such was the ruling of the court in the case of *Lawrence v. Hunt*, (10 Wendell, 82,) where it was objected that in the former suit there was another plaintiff joined. Where the former suit was at law, this objection might have some weight, for it could not well be said that a contract of A and B with D and C was the same as that in another suit where A was sole plaintiff and D sole defendant. But this objection cannot apply where the first issue is in chancery, and parties collaterally interested are made [ \* 242 ] parties to the litigation, that it may be \* final, and not because they were legal parties to the original contract on which the litigation is founded. In such a case the pleadings may show the contract or subject-matter of the litigation to be the very same, and directly in issue; in the other, it could not be well so. As we are of opinion that there was no error in this instruction, it

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will not be necessary to notice the other points alluded to in the argument, this one being conclusive of the whole case.

The judgment of the circuit court is therefore affirmed, with costs.

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McEWEN and WILEY, Plaintiffs in Error, v. JOHN DEN and others.

24 H. 242.

ACKNOWLEDGMENT OF DEEDS—ADVERSE POSSESSION.

1. Prior to 1856, by the laws of Tennessee, a deed could not be acknowledged or proven in another State before the clerk of a court. The act of 1856, which provided that such proof or acknowledgment shall be valid, and that deeds so acknowledged or proved may be registered, and shall be good to pass the title, is prospective only in its operation, and does not cover acknowledgments previously made.
2. The pleas of the statutes of limitation must be governed by the decision of the question whether Evans's coal bank was within grant No. 22,261. The instructions of the court as to the mode of surveying that grant were too vague. The true directions given by this court.

WRIT of error to the circuit court for the eastern district of Tennessee. The case is fully stated in the opinion.

*Mr. Maynard* and *Mr. Heiskell*, for plaintiffs in error.

*Mr. Nelson*, for defendants.

\* Mr. Justice CATRON delivered the opinion of the court. [ \* 243 ]

Bulkley sued McEwen and Wiley, in an action of ejectment, for 5,000 acres of land. At the trial, the plaintiff introduced a patent issued to Thomas B. Eastland, dated December 21st, 1838, No. 22,261. The plaintiff next offered to read the copy of a deed from Eastland to Bulkley for the tract granted, (with other lands;) to the reading of which objection was made, but the court admitted the copy to be read; to the admission of which the defendants excepted.

By the laws of Tennessee, the fee in land does not pass unless the conveyance is proved, or duly acknowledged and registered, This deed purports to have been acknowledged by the grantor, Eastland, before the clerk of the court of common pleas for the city and county of New York, and is certified under his seal of office. And this was accompanied by a certificate of the judge of said court, that Joseph Hoxie, before whom the deed was acknowledged, was clerk, and that the court of which he was clerk was a court of record. On this evidence of its execution, the deed was registered.

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in the county where the land lies ; but at what time it was registered does not appear. The acknowledgment was taken October 25th, 1839. At that time, a deed for lands lying in Tennessee could not be acknowledged or proven in another state before the clerk of a court.

In 1856, an act was passed, (ch. 115,) which it is insisted validates this probate. It provides, that deeds proved or acknowledged before the clerk of any court of record in any of the States of this Union, and certified by the clerk under his seal of office, and the chief magistrate of the court shall certify to the official character of the clerk, the probate or acknowledgment [ \* 244 ] \*shall be valid. And the second section declares, that all deeds proved or acknowledged, and certified in manner aforesaid, may be registered in this State, and shall be good to pass title, &c.

It is insisted, that the act is retrospective as well as prospective in its operation, and covers the acknowledgment made in 1839, in New York.

We think the statute of 1856 is prospective, and that to hold otherwise would be a strained construction, and violate a general rule of jurisprudence, to wit, that it is of the very essence of a new law that it shall apply to future cases, and such must be its construction, unless the contrary clearly appears.

It is next insisted that the act of 1856, being an amendment of the act of 1839, carries with it the provisions of this law. The act of 1856 declares, that the act of 1839 " be so amended " that all deeds, powers of attorney, &c., proved or acknowledged before a foreign clerk, may be registered, and have full effect. An additional mode of probate is provided ; nor does the act go any further.

The deed offered in evidence was recorded without legal proof of its execution ; and, therefore, a copy of the record could not be evidence. The court erred in admitting the copy to go to the jury.

The plaintiff below described the land sued for in his declaration, which is required to be done by the laws of Tennessee. The declaration calls for the boundaries of grant No. 22,261, made to Thomas B. Eastland, December 21st, 1838. The defendants then gave in evidence two other grants, for 5,000 acres each ; one to Thomas B. Eastland, No. 22,267, being one of the tracts contained in the deed from Eastland to Bulkley ; and another to Henry H. Wiley, one of the defendants, No. 26,086. The two junior patents covered the principal possession of the defendants, at a place known as Evans's coal bank. This fact was admitted ; and it furthermore appeared, that the defendants had held seven years' adverse pos-

session at the coal bank, under Wiley's grant. And it was insisted below, and is again here, that as Bulkley had shown himself to be the owner of both the tracts granted, and as the operation of the act of limitations drew to Wiley's younger [\* 245] patent the title of Eastland's junior grant, and vested this title in the defendants, they were protected by the statute, because Bulkley had the right to sue at all times during the seven years, by virtue of grant No. 22,267. But the court instructed the jury to the reverse of this assumption, and, we think, correctly. From the facts stated, it is true that the right of action founded on the younger grant to Eastland was barred, to the extent that Wiley's grant interfered with No. 22,267; and assuming it to be true, that the defendants could avail themselves in defense, or affirmatively, of this title, still it could avail them nothing, as both No. 22,267 and No. 26,086 were inferior to grant No. 22,261.

The main question in the cause turns on the fact, whether the possession at Evans's coal bank was within the boundary of the grant No. 22,261, described in the declaration, and alone relied on at the trial by the plaintiff. It calls to begin on the south bank of Coal creek, four poles below Bowling's mill; thence running south with the foot of Walden's ridge, 894 poles, to a stake at letter H, in Henderson & Co.'s Clinch river survey; then west, crossing Walden's ridge, 894 poles to a stake; thence north 894 poles to a stake; then a direct line to the beginning.

It was proved at the trial, and is admitted here, that no line was originally run and marked but the first one; and that at H there is a marked poplar corner tree, which is a line mark of the grant. It being admitted that the first line is established, and that it is regarded as a north and south line, and that the other lines of the tract were not run or marked, it follows they must be ascertained by course and measurement. How they are to run is matter of law; and on this assumption, the circuit court instructed the jury as follows: "To identify the land appropriated, the jury must look to the calls, locative and directory, the foot of the mountain, the creek, the coal bank, the marked trees, courses and distance, number of acres demanded and paid for, &c.; and they will look to the survey, full or partial; that assuming the correct mode of survey to have been by horizontal measurement, and that the surveyor \*based his identification of the land [\* 246] entered on surface measure, in accordance with his custom and the custom of the mountain range of country in which he resided, this would not of itself defeat the location of the land, and the boundaries of the grant as indicated by the survey, calls, and

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other evidence, to all of which they would look in adjusting the boundaries of the plaintiff's grant." To this charge, exception was taken. We think the instructions given were too vague and general to afford the jury any material aid in ascertaining the true boundaries of the land granted. The first line calls for two corners admitted to exist; this line must govern the three others. (1 Meigs's Digest, 154.) It falls short of the distance called for, being only about 800 poles long. Its course being found, the next line running west must be run at right angles to the first one. In ascertaining the southwest corner of the tract at 894 poles from the poplar corner, the mode of measuring will be to level the chain, as is usual with chain-carriers when measuring up and down mountain sides, or over other steep acclivities or depressions, so as to *approximate*, to a reasonable extent, horizontal measurement, this being the general practice of surveying wild lands in Tennessee. The reasonable certainty of distance, and approximation to a horizontal line, is matter of fact for the jury to determine.

The 3d line running north, from the ascertained western termination of the second, must run parallel with the first line, and be continued to the distance of 894 poles; the chain being leveled as above stated. The 4th line will be run from the northern terminus of the 3d line to the beginning near Bowling's mill.

The surveyor who made the survey on which grant No. 22,261 is founded, deposed at the trial, "that no actual survey was made in 1838 of said land, except the first line from A to H. That the other three lines of the grant were not run, but merely platted. That the proper mode of making surveys was by horizontal measurement, but that he had not been in the habit of making them in that way; that in making the line from A to H, in this survey, he had measured the surface; that the custom of the country [\*247] was to adopt surface measure; \*and that he had made the survey in accordance with such custom."

The grantee was bound to abide by the marked line from A to H; but the other lines must be governed by a legal rule, which a local custom cannot change. Should this custom be recognized as law, governing surveys, it must prevail in private surveys, in cases of sales of land, when the purchaser who bought a certain number of acres might, by surface measure across a mountain, lose a large portion of the land he had paid for. And such would be the case with this grantee, were he restricted to surface measure; whereas, by the terms of his patent, the government granted to the extent of lines approximating to horizontal measurement. How far the act of limitations will affect the plaintiff's title, will depend on the

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fact whether Evans's coal bank falls within the boundary of the patent sued on, as it is not claimed that the other possession at a different place on grant No. 22,261, and for which trespass the recovery was had, was seven years old when the suit was brought.

It is ordered that the judgment below be reversed, and the cause remanded for another trial to be had therein.

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THE POWHATAN STEAMBOAT COMPANY, Plaintiffs in Error, v. THE  
APPOMATTOX RAILROAD COMPANY.

24 H. 247.

SUNDAY LAWS—GOODS BURNED IN DEFENDANTS' WAREHOUSE.

By a contract between plaintiffs and defendants, the goods which plaintiffs had agreed with shippers to carry from Baltimore to Petersburg were received by the latter at City Point, and delivered at Petersburg. It had been the custom to store these goods in defendants' warehouse on Sundays, when the boat arrived at City Point on that day, and keep them over until Monday: Held, that whether the work of placing these goods in the warehouse on Sunday, which was done by plaintiffs, was a violation of the Sunday law of Virginia or not, it did not affect the obligation of defendants, as carriers, to keep them safely, and deliver at Petersburg, and that plaintiffs having been sued, and compelled to pay for their loss by fire in defendants' warehouse on that day, could recover against the defendants.

WRIT of error to the circuit court for the eastern district of Virginia. The case is very fully stated in the opinion.

*Mr. Schley and Mr. Jaynes*, for plaintiffs in error.

*Mr. Robinson*, for defendants.

\*Mr. Justice CLIFFORD delivered the opinion of the court. [\* 249]

This is a writ of error to the circuit court of the United States for the eastern district of Virginia. All of the questions presented for decision in this case arise upon the instructions given by the court to the jury; but a brief reference to the pleadings and evidence will be necessary, in order that the precise nature of those questions may be clearly and fully understood.

It was an action on the case, and the declaration contained three counts, which are set forth at large in the transcript. Among other things, the plaintiffs alleged, in the first count, that the defendants were common carriers for hire; that they, the plaintiffs, at the special instance and request of the defendants, on the twenty-sixth day of June, 1853, at City Point, in the State of Virginia, caused certain goods and merchandise to be delivered to the

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defendants, as such carriers, to be by them transported from the place of delivery to Petersburg, in the same State; and that the defendants, in consideration thereof, and of certain hire and reward to be paid them therefor, undertook and promised safely and securely to carry and convey the goods and merchandise to the place of destination, and there to deliver the same; and the complaint is, that the defendants, not regarding their promise and undertaking in that behalf, so conducted themselves, as such carriers, that the goods and merchandise, through their negligence and carelessness, were wholly lost to the plaintiffs. To the whole declaration the defendants pleaded that they never under-  
[ \* 250 ] took \*and promised as the plaintiffs had thereof alleged against them, and upon that issue the parties went to trial.

From the evidence in the case, it substantially appears that the plaintiffs were the owners of a weekly line of steamers, employed in the regular and stated transportation of goods and merchandise between the city of Baltimore, in the State of Maryland, and the city of Richmond, in the State of Virginia. Their steamboats, on the trip each way, were accustomed to stop at the intermediate place called City Point, on James river, for the purpose of landing goods to be sent to Petersburg, and also for the purpose of receiving other goods arriving from the same place to be transported to either terminus of the steamboat route. Defendants were a railroad company, and were also engaged in the transportation of goods and merchandise over their railroad, extending from City Point to Petersburg, in the same State. For many years there had been an arrangement and contract between the parties, whereby goods and merchandise destined for transportation to the latter place were to be received by the plaintiffs in Baltimore, carried in their steamers to City Point, and there delivered to the defendants, to be by them transported over their railroad to the place of destination. Receipts for the goods were given by the plaintiffs in Baltimore, promising to deliver the same to the consignees at Petersburg, where the plaintiffs had an agent, who collected the entire freight money, and paid over one fourth part of the amount to the defendants. When the steamers arrived at City Point, the goods were landed, and deposited in the warehouse of the defendants, which was situated on the wharf adjacent to the railroad.

According to the regular course of the transportation, one of the steamboats of the plaintiffs left Baltimore every Saturday afternoon, arriving at City Point about noon on Sunday, and there such of her cargo as was destined for Petersburg was landed and



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deposited in the warehouse of the defendants, and the steamer on the same day proceeded on her voyage to the place of her destination. Goods so landed and deposited remained in the warehouse until the following day, because the defendants run no merchandise train on Sundays. Usually \*the warehouse [ \* 251 ] was opened on the occasion, and afterwards closed by the agent of the defendants; but the whole labor of landing and depositing the goods, except the opening and closing of the warehouse, was performed by the plaintiffs.

Pursuant to the regular course of the transportation, one of the steamers of the plaintiffs arrived at City Point on Sunday, the twenty-sixth day of June, 1853, about noon, with the goods in controversy on board. On the arrival of the steamer at the wharf, the goods, being destined for Petersburg, were landed and deposited in the warehouse, and the evidence shows that the whole labor of landing and depositing them was performed by the plaintiffs, except that the agent of the defendants unlocked and opened the warehouse for that purpose, and afterwards closed it, as he had been accustomed to do on former occasions. After the goods had been so deposited, the steamer proceeded on her voyage up the river, and on the same day the warehouse and all the goods were destroyed by fire. Suit was brought against these plaintiffs by the shipper of the goods, and payment was recovered against them for a sum exceeding twelve thousand dollars, which they had to pay. Evidence was then introduced by the defendants, tending to show that the goods were deposited in their warehouse for the convenience and accommodation of the plaintiffs, upon the agreement and understanding that the goods should remain there until the following morning, and be at the risk of the plaintiffs. Under the instructions of the court, the jury returned their verdict in favor of the defendants, and the plaintiffs excepted to the instruction. It is to the concluding portions only of the instruction that the plaintiffs now object, and for that reason the preceding part of it is omitted. Having assumed that state of the case in the introductory part of the instruction—which the evidence adduced by the plaintiffs tended to prove, and which, if found to be true, and the goods had been deposited on an ordinary working day, would have entitled the plaintiffs to recover—the jury were substantially told by the presiding justice, in the concluding portion of the instruction, that notwithstanding the facts so assumed, still, if they found from the evidence that the goods were delivered \*on a [ \* 252 ] Sunday, under a contract between the parties, express or implied, that they might be received and accepted on that day,

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and were destroyed by fire on the day on which they were delivered and received, to wit, on Sunday, the twenty-sixth day of June, 1853, then their verdict should be for the defendants. Had the goods arrived and been deposited in the warehouse on an ordinary working day, the preceding part of the instructions assumed that the evidence in the case would authorize a finding in favor of the plaintiffs, and the principal question is, whether the rights of the parties were varied by the fact that the goods were landed and deposited on a Sunday. It is insisted by the defendants that it does vary their rights, especially as the goods were destroyed accidentally on the day they were delivered and received. To support that theory, they refer, in the first place, to the sixteenth and seventeenth sections of the code of Virginia. By the sixteenth section it is provided, among other things, that "if a free person on a Sabbath day be found laboring at any trade or calling, or employ his apprentices, servants, or slaves, in labor or other business, except in household or other work of necessity or charity, he shall forfeit ten dollars for each offense;" and by the seventeenth section it is provided, that no forfeiture shall be incurred under the preceding section for the transporting on Sunday of the mail, or of passengers and their baggage. Most of the States have laws forbidding any worldly labor or business within their jurisdiction on the Lord's day, commonly called Sunday, except works of necessity or charity. Those laws were borrowed substantially from similar regulations in the parent country, and in some of the States were adopted at a very early period in the history of the colonial governments. Statutes of the description mentioned usually contain an express prohibition against such labor; but we are inclined to adopt the early rule upon the subject, that where the statute inflicts a penalty for doing an act, although the act itself is not expressly prohibited, yet to do the act is unlawful, because it cannot be supposed that the legislature intended that a penalty should be inflicted for a lawful act. Adopting that rule of construction, it must be assumed that all labor "at any \*trade or calling on a Sabbath day, except in household or other work of necessity or charity," is prohibited in the State of Virginia by the sixteenth section of the code already cited. But the defendants do not attempt to maintain that the contract between the plaintiffs and the shipper of the goods, for the transportation of the same from Baltimore to Petersburg, falls within that implied prohibition, or that the voyage of the steamer from Baltimore to Richmond was illegal. As the evidence shows, the steamer left Baltimore on Saturday, the day previous to the fire which con-

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sumed the warehouse and the goods, and it is very properly conceded by the defendants that she might lawfully, under the circumstances, proceed on her voyage to her place of destination, notwithstanding the fact that, in so doing, she had to sail on "a Sabbath day;" and if so, it clearly follows that she might stop at any intermediate place on the route. Transportation of the goods, therefore, so far as they were carried in the steamer, was a lawful act, and, in effect, it is conceded to have been so by the defendants. Merchandise trains were not run by the defendants on Sundays; and, of course, neither the contract of the shipper nor the arrangement between these parties contemplated that the goods would be carried over the railroad on that day. Shippers made their contracts with the plaintiffs for the transportation of the goods over the whole route, from the place of departure to the place of destination, wholly irrespective of the circumstances which might afterwards attend the transfer of the goods from the steamer to the defendants, and without any knowledge, so far as appears, whether it would be accomplished on a Sunday, or on an ordinary working day.

When the shipper had delivered the goods to the plaintiffs, the contract between him and them was completed, and it is self-evident that it was one to which the Sunday laws of Virginia have no application whatever. All such contracts were made by the plaintiffs, but they were made for the separate benefit of the defendants, as well as themselves, and the arrangement between these parties had respect to the apportionment of the service to be performed in carrying out the contract made with the shipper, and the division of the freight \* money to be received for the entire service. Each party worked for himself, and not for the other, and the compensation for that service was to be derived from the shipper of the goods. Neither party promised to pay the other anything, but each was to receive a proportion of the freight money equal to the proportion of the service the arrangement between the parties required him to perform. Plaintiffs made the contract with the shippers in their own name, received the goods at Baltimore, transported them to City Point, and on the arrival of the steamer there, landed the goods and deposited them in the warehouse of the defendants. On the other hand, the defendants furnished the warehouse, opened and closed it on the occasion, took the custody of the goods until the following morning, and then transported them over the railroad to the place of destination, and delivered them to the consignees. After the goods were delivered to the consignees, the agent of the plaintiffs collected the entire

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freight money, and paid over to the defendants such portion of it as belonged to them under the arrangement. Merchants sending goods knew only the plaintiffs in the entire transportation; but, as between these parties, each performed a separate service for himself, and had no other claim for compensation than his proportion of freight money. Had the goods been lost at sea through the negligence of the plaintiffs, it is clear that the defendants would not have been answerable either to the shippers or to the plaintiffs, because the defendants had no interest in the steamer, and the arrangement between the parties did not contemplate that they should be responsible for her navigation. Shippers, however, had a right to proceed against the plaintiffs, although the loss had occurred while the goods were in the custody of the defendants, because their contract with the plaintiffs covered the whole route; and as between them and the defendants, the latter were but the agents of the plaintiffs. Accordingly, the shippers recovered judgment against the plaintiffs, and clearly the defendants are answerable over, unless it is shown that the case is one where courts of justice will not interfere to enforce the contract. It is insisted by the plaintiffs that the labor of landing and depositing [ \* 255 ] \*the goods was a work of necessity, within the meaning of the exception contained in the statute; but in the view we have taken of the case, it will not be necessary to decide that question at the present time.

Suppose it be admitted that the plaintiffs violated the Sunday law in landing the goods and depositing them, and that defendants also violated the same law in opening and closing the warehouse on the occasion; still the admission will not benefit the defendants, for the reason that the cause of action in this case is not founded upon any executory promise between the parties, touching either the landing and depositing of the goods or the opening and closing of the warehouse, but it is based upon the non-performance of the duty which arose after those acts had been performed. If the action was one to recover a compensation for the labor of landing and depositing the goods, or to recover damages for a refusal to comply with the agreement to open and close the warehouse, the rule of law invoked by the defendants would apply. Granting, however, for the sake of the argument, that those acts of labor fall within the prohibition of the statute, still their performance did not have the effect to transfer the general property in the goods to the defendants, nor to release or discharge them from the subsequent obligations which devolved upon them as common carriers for hire. Safe custody is as much the duty of the carrier as due transport and

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right delivery; and although the defendants were forbidden to transport the goods over the railroad, or to deliver the same on "a Sabbath day," yet they might safely and securely keep such as were in their custody, and it was their duty so to do. Irrespective of the Sunday law, the plaintiffs could maintain no action against the defendants for the service they had performed in landing and depositing the goods, for the best of all reasons, that in performing it they had worked for themselves, and not for the defendants. Nothing, therefore, can be more certain than the fact that the claim in this case is not founded upon any executory promise necessarily connected with those supposed illegal acts. On the contrary, the real claim is grounded on the obligations which the law imposed \* on the defendants safely and securely to [\* 256] keep, convey, and deliver the goods, and upon their subsequent negligence and carelessness, whereby the goods were lost. To take care of the goods on "a Sabbath day," and safely and securely keep them, after the goods were received, was a work of necessity, and therefore was not unlawful, even on the theory assumed by the defendants, and the defendants were not expected to convey or deliver the goods until the following day. On the theory assumed, the defendants might have refused to open the warehouse, or to allow the goods to be deposited; and if they had done so, no action could have been maintained against them for the refusal. But they elected to do otherwise, and suffered the plaintiffs to deposit the goods; and when the warehouse was closed, all the supposed illegal acts were fully performed.

Whatever contract or arrangement existed between the parties upon that subject had then been fully executed, and those who had been employed in landing and depositing the goods, as well as the agent of the defendants, who had opened and closed the warehouse, if the acts were illegal, had respectively become liable to the penalty which the law inflicts for such a violation of its mandate. That penalty is a fine of ten dollars; but there is no authority in any court to declare the goods forfeited, nor do we perceive any just ground for holding that the general property in the goods was thereby changed. Unless the goods be considered as forfeited, or it be held that the property became vested in the defendants, it is difficult to see any reason why the plaintiffs ought not to recover in this suit, even admitting that the acts of landing and depositing the goods, and of opening and closing the warehouse, were within the prohibition of the statute.

Subsequent custody of the goods was certainly not within that prohibition; and if not, then the law imposed the obligation upon

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the defendants to keep the goods safely and securely until the following morning, and afterwards to transport them over the railroad to the place of destination, and deliver them to the consignees. To

assume the contrary, would be to admit that a carrier, [ \* 257 ] accepting goods to be \* transported on an ordinary working day, may set off the fact that the labor of depositing the goods in his warehouse was performed on "a Sabbath day," against all the subsequent obligations which the law would otherwise impose upon him with respect to the goods. Such a rule of law, if acknowledged by courts of justice, and carried into effect, would amount to a forfeiture of the goods, so far as the shipper is concerned, as its practical operation would be to allow the carrier, if he saw fit, voluntarily to destroy the goods, or to appropriate them to his own use.

Upon a careful examination of the numerous authorities bearing upon the question, the better opinion, we think, is, that inasmuch as the subsequent custody of the goods was not unlawful, that the obligations of the defendants, under the circumstances of this case, were not varied by the fact that the goods were deposited in their warehouse by their consent on "a Sabbath day." Great injustice would result from any different rule, and although the precise question has seldom or never been presented for decision, yet we think the analogies of the law fully sustain the rule here laid down. For these reasons we are of the opinion that the instruction given to the jury was erroneous. The judgment of the circuit court is therefore reversed, and the cause remanded, with directions to issue a new venire.

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ROBERT GUE, Appellant, v. THE TIDE WATER CANAL COMPANY.

24 H. 257.

## SALE UNDER EXECUTION OF CORPORATE FRANCHISES.

1. At the common law a franchise, as of a corporation to construct a canal and take toll, cannot be sold under execution.
2. No statute exists in the State of Maryland which authorizes such a sale.
3. The franchises of the Tide Water Canal Company were granted that the public might be benefited by the facilities afforded for transportation and carriage; and a sale under execution of the canal locks, wharf, toll-house, &c., which, without carrying the franchise, destroys the utility of the canal to the public, and seriously impairs the rights of other creditors, will be enjoined by a court of equity.
4. If a judgment creditor has a right to enforce a sale of such property for payment of his debt, his remedy is in a court of equity, where the rights and priorities of all the creditors and the public can be protected, and the property of the corporation disposed of to the best advantage for the interest of all concerned.

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APPEAL from the circuit court for the district of Maryland. The case is well stated in the opinion.

*Mr. Campbell* and *Mr. McLaughlin*, for appellant.

*Mr. Dobbin*, for the appellee.

\* Mr. Chief Justice TANEY delivered the opinion of the [ \* 262 ] court.

It appears from the record in this case that a judgment was obtained by Robert Gue, the appellant, against the Tide Water Canal Company, in the circuit court of the United States for the district of Maryland, upon which he issued a *fiery facias*, and the marshal seized and advertised for sale a house and lot, sundry canal locks, a wharf, and sundry other lots; all of which property, it is admitted, belonged to the Canal Company in fee.

The Canal Company thereupon filed their bill in the circuit court, praying an injunction to prohibit the sale of this property under the *fiery facias*. The injunction was granted, and afterwards, on final hearing, made perpetual. And from this decree the present appeal was taken.

The Tide Water canal is a public improvement situated in the State of Maryland, and constructed and owned by a joint stock company chartered by the State of Maryland for that purpose. The canal extends from Havre de Grace, in Maryland, to the Pennsylvania line; and it is admitted that the property levied on is necessary for the uses and working of the canal.

Upon the matters alleged in the bill and answer several questions of much interest and importance have been raised by the respective parties, and discussed in the argument here. But we do not think it necessary to decide them, nor to refer to them particularly, because, if it should be held that this property is liable to be sold by a judicial proceeding for the payment of this debt, yet it would be against equity and unjust to the other creditors of the corporation, and to the corporators who own the stock, to suffer the property levied on to be sold under this *fi. fa.*, and consequently the circuit court was right in granting the injunction.

\*The Tide Water canal is a great thoroughfare of trade, [ \* 263 ] through which a large portion of the products of the vast region of country bordering on the Susquehanna river usually passes, in order to reach tide-water and a market. The whole value of it to the stockholders consists in a franchise of taking toll on boats passing through it, according to the rates granted and prescribed in the act of assembly which created the corporation. The

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property seized by the marshal is of itself of scarcely any value, apart from the franchise of taking toll, with which it connected in the hands of the company, and if sold under this *feri facias* without the franchise, would bring scarcely anything; but would yet, as it is essential to the working of the canal, render the property of the company in the franchise, now so valuable and productive, utterly valueless.

Now, it is very clear that the franchise or right to take toll on boats going through the canal would not pass to the purchaser under this execution. The franchise being an incorporeal hereditament, cannot, upon the settled principles of the common law, be seized under a *feri facias*. If it can be done in any of the States, it must be under a statutory provision of the State; and there is no statute of Maryland changing the common law in this respect. Indeed, the marshal's return and the agreement of the parties shows it was not seized, and consequently, if the sale had taken place, the result would have been to destroy utterly the value of the property owned by the company, while the creditor himself would, most probably, realize scarcely anything from these useless canal locks, and lots adjoining them.

The record and proceedings before us show that there were other creditors of the corporation to a large amount, some of whom loaned money to carry on the enterprise. And it would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders, by dissevering from the franchise property which was essential to its useful existence.

[ \* 264 ] \*In this view of the subject, the court do not deem it proper to express any opinion as to the right of this creditor, in some other form of judicial proceeding, to compel the sale of the whole property of the corporation, including the franchise, for the payment of his debt. Nor do we mean to express any opinion as to the validity or operation of the deeds of trust and acts of assembly of the State of Maryland, referred to in the proceedings. If the appellant has a right to enforce the sale of the whole property, including the franchise, his remedy is in a court of chancery, where the rights and priorities of all the creditors may be considered and protected, and the property of the corporation disposed of to the best advantage, for the benefit of all concerned. A court of common law, from the nature of its jurisdiction and modes of proceeding, is incapable of accomplishing this object;



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and the circuit court was right in granting the injunction, and its decree is therefore affirmed.

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THOMAS M. LEAGUE, Plaintiff in Error, v. CYRUS W. EGERY and others.

24 H. 264.

TEXAS LAND TITLES.

1. Under the colonization laws of Mexico, the consent of the federal executive of Mexico was essential to the grant of lands within the border and coast leagues; and the courts of the State of Texas have uniformly held that the permission of the federal government to *colonize* within these lines did not dispense with the necessity of procuring the assent of the federal executive to the grants of the *State* within the littoral leagues.
2. Without inquiring whether this was the sound interpretation of the Mexican law as applicable to those grants, this court adopts the rule now well settled by repeated decisions as the rule of property in Texas on that point.

WRIT of error to the district court for the eastern district of Texas.

*Mr. Hughes*, for plaintiff in error.

*Mr. Phillips*, for defendants.

\* Mr. Justice CAMPBELL delivered the opinion of the [ \* 265 ] court.

The plaintiff sued in the district court for a parcel of land containing two and one-half leagues in the county of Refugio, in the State of Texas. The answer and amended answer of the defendants contain some twenty pleas, and a number of questions are presented by the record; but as the decision of the cause will be complete by the opinion the court have formed of the original grant from the State of Coahuila and Texas, from which the claim of the plaintiff is derived, and on which it depends, a statement of that grant will be sufficient. In the year 1826, Power and Hewetson proposed to the government of Mexico to establish a colony on the seacoast of Texas, within what is termed in their law of colonization the littoral leagues. This proposal was accepted, and the partners entered upon the fulfillment of that enterprise. In December, 1829, they respectively applied to the governor of the State of Coahuila and Texas for the purchase of eleven leagues of land each, within the limits of the colony. This offer was accepted; the petitioners were authorized to locate their grant upon any lands in the colony that were vacant, or elsewhere, if there was not a sufficiency of vacant land for that purpose; and the general com-

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*League v. Egery.*

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missioner of the colony was directed to deliver possession of the land selected, and to perfect the corresponding titles. In November, 1834, Power represented to this general commissioner that the partners had selected only seventeen and one-quarter leagues, and requested him to issue grants for two tracts, one containing two and a half leagues, and the other, two and one-quarter leagues, to complete this contract, at a place designated. This request of the petitioner was complied with, and one of these grants is that which was introduced to support the plaintiff's title, and with which he connected himself by mesne conveyances.

[ \* 266 ] \* The location is within the littoral or coast leagues described in the fourth sections of the colonization laws of Mexico, of 1824 and 1828.

The litigation between the grantees and their assigns and the defendants for this land has been protracted in the courts of Texas, and the opinion of the supreme court of that State has been very definitely expressed upon the validity of their titles on two several occasions.

Smith v. Power, 14 Tex. R. 146.

Smith v. Power, 23 Tex. R. 29.

In the latter case the supreme court said: "No question is more authoritatively settled by the repeated decisions of this court, than that the consent of the federal executive of Mexico was essential to the validity of a grant of lands of the character of the present within the border and coast leagues. *Edwards v. Davis*, 3 Tex. R. 321; 10 Id. 316; *Republic v. Thorn*, 3 Id. 499; 5 Id. 410; 9 Id. 410, 556. In the case of *Smith v. Power*, (14 Texas R.,) the parties to this appeal, it was held that the grant here in question, under which the defendant claims, could not be distinguished from those which had been passed upon in former cases; and upon the authority of those cases, it was decided that the grant wanting such consent was void. That question, therefore, cannot be considered as now an open one. A series of decisions continued almost from the organization of this court down to the present time, thus settling the construction of the old local law, upon which the titles to real property in the oldest and most densely peopled portions of the State so largely depend, must be regarded as emphatically the law of the State." In accordance with well-established principles in this court, we accept this uniform and stable body of judicial decision from the court of last resort of the State in which the property is situated, and in which the transactions that form the subject of this litigation took place, as conclusive testimony of the rule of action prescribed by the authorities of the State, as applicable to

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their interpretation and adjustment. We do not inquire whether a more suitable rule might have been adopted, nor whether the arguments which led to its adoption were forcible or just.

We receive \*the decisions having the character that are [ \* 267 ] mentioned in the extract we have made from the opinion of the supreme court of Texas as having a binding force almost equivalent to positive law. Such being our conclusion in respect to this grant, we must sanction the judgment of the district court that denies to it validity.

Judgment affirmed.

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HENRY S. FOOTE, Plaintiff in Error, v. EGERY and SMITH.

24 H. 267.

THIS case involved the same principle and was argued by the same counsel as in the former case, and was decided on the same grounds. It need not be further repeated.

Mr. Justice CAMPBELL delivered the opinion of the court.

The plaintiff claimed in the district court two leagues and one-half of land in the county of Refugio, in the State of Texas, which were in the possession of the defendants. The defendant answered the claim by asserting title under grants from the State of Texas, and by the operation of the statutes of limitation.

The plaintiff maintained his claim by producing a grant to James Power and James Hewetson, issued under the authority of the State of Coahuila and Texas, in the year 1834, upon a contract of sale of a certain quantity of lands in the colony of Power and Hewetson, situate within the littoral or coast leagues. In deriving his title under these grantees, the plaintiff produced a deed, or an agreement for a conveyance, from Hewetson to Power and Walker; this paper was rejected as testimony by the court. Walker, this vendee, died in 1836, \*being a citizen of, and resi- [ \* 268. ] dent in, the United States. His brother, also a citizen of the United States, succeeded to his estate, and in the year 1837 conveyed his interest to a person under whom the plaintiff claims.

Three questions were made upon the trial in reference to the validity of the plaintiff's title: 1st. Whether the State of Coahuila and Texas, in the year 1829, or in the year 1834, could sell and convey land to a colonist within the littoral or coast leagues, without the consent or approbation of the central government of Mex-

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ico. 2d. Whether the paper executed by Hewetson to Power and Walker was a conveyance of the land, or merely an agreement to convey. 3d. Whether in 1836, Walker, a citizen of the United States, could inherit land in Texas, from one who was also a citizen of, and a resident in, the United States. The decision of either of these questions in favor of the defendants is fatal to the plaintiff's right to recover.

The first of these questions has been determined by this court in the case of *League v. Egery* and others in the negative. This decision is in accordance with the decision of the district court, whose judgment is consequently affirmed.

JOHN GREER and others, Plaintiffs in Error, v. S. M. MEZES and others.

24 H. 268.

CALIFORNIA LAND GRANTS—SURVEYS.

1. Where a grant has been confirmed by the commissioner and the courts, and has been surveyed, and a patent issued to the grantees, the correctness of the survey cannot be disputed in an action of ejectment by persons in possession claiming under a title not perfected by survey and patent.
2. A plaintiff in ejectment can sue together all who are trespassers on his tenement. If they plead separately as to specific parcels or pieces of the land, those who so plead in effect disclaim as to the rest, and are entitled to a separate verdict. Those who join in pleading the general issue are guilty, unless they show a defense as to all the land sued for, and a general verdict is good against them all. The form of pleading by petition instead of the old legal fiction does not change these principles governing the nature of the action.

WRIT of error to the circuit court for the northern district of California.

*Mr. Blair* and *Mr. Crockett*, for plaintiffs.

*Mr. Janin*, for defendants.

[ \* 273 ] \* Mr Justice GRIER delivered the opinion of the court.

The defendants in error are the owners of the tract of land called Las Pulgas, the title to which was confirmed to the heirs of Arguello by this court, (18 How. 539.) This action of ejectment was brought by them against Greer and a number of others, now plaintiffs in error. The defendants pleaded

[ \* 274 ] \* severally the general issue, but no one of them took defense specially for any definite part of the land claimed in the writ, or made a disclaimer as to any portion of it. The

plaintiffs gave in evidence the survey and patent of the Las Pulgas tract, and proved the defendants to be in possession within its boundaries. Their Mexican title was dated in 1835, and had the approbation of the departmental assembly, preceded and followed by possession.

Their grant, as confirmed by this court, is bounded on the north by the arroyo of San Francisquito, on the south by that of St. Mateo, on the east by the estuary, and on the west by the cañada or valley of Raymundo, "being four leagues in length and *one in breadth*." The plaintiffs having shown a complete legal title to the land in dispute, were entitled to a verdict, unless the defendants could show a better.

They claimed under a grant to Juan Coppinger, dated in 1840, for the valley of Raymundo, specifying nothing as to quantity, but describing it as bounded on the east by the rancho of Las Pulgas, and on the west by the Sierra Morena, south by rancho of Martinez, and north by the lagoon. The expediente provides, that "the judge who shall deliver possession of the land shall have it measured according to the ordinance, specifying the amount of sitios it contains."

This grant had never received the sanction of the departmental assembly, nor had possession ever been delivered, or any precise boundaries ascertained by survey; and although confirmed as a valid, equitable claim by the district court of California, it has never been surveyed, nor had a patent been issued for it under the decree of confirmation. The claim of defendants to the land is therefore not yet completed into a legal title. Its boundaries and quantity still remain uncertain and undefined. The Sierra Morena may be sufficiently definite as the boundary of a State or kingdom, or of a valley, but is certainly a very vague and uncertain line for a survey of land. The eastern boundary called also for the rancho of Las Pulgas; this was also uncertain till the western line of Las Pulgas was correctly surveyed. Coppinger's grant, calling for land outside of the Pulgas grant, and to be bounded by \*it, could have no possible interference or claim to land [\* 275] within it. Hence, the defendants could resort to no other defense than to offer proof that the survey and patent of Las Pulgas were erroneous as regarded the location of the western line, because it embraces a portion of the level land in the cañada or valley Raymundo, which is the call of its western boundary.

It is the refusal of the court to admit testimony for that purpose which is now alleged as error.

The testimony offered might well have been rejected as irrele-

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vant, for it does not follow, that if the western line of Las Pulgas, as run by the surveyor general, included level land in the valley, that it was at all incorrect. The western boundary line of Las Pulgas, as adjudged by the decree of this court, had two several points of description to fix its location; one uncertain and vague, the other admitting of mathematical certainty. The call of the Cañada Raymundo on the west is as vague as that for the Sierra Morena, a chain of mountains. But the breadth of one league from the estuary or bay was a certain and definite boundary on the east, and showed conclusively the precise location of the line. Las Pulgas could claim to extend but a league west, whether that reached to the hills on the east of the valley or not, and was entitled to have the league in breadth, whether it carried the western line over the hills or not. Coppinger's grant can claim only what is left after satisfying Las Pulgas, which calls for a certain quantity and a certain boundary. There was no offer to prove that the survey of Las Pulgas was extended beyond such limit.

The court below refused to admit the testimony, not for its irrelevancy, but its incompetency; because the defendants, claiming under a mere equitable title, having neither survey nor patent, were not in a condition to dispute in a court of law the correctness of the survey made by the public officer or resist the plaintiff's perfect legal title.

The fact and the conclusion of the court from it are undoubtedly correct. It is well settled that both plaintiff and defendant must produce a strictly legal title, whether it be in fee or as lessee for years.

[\*276] \*The plaintiff had shown a complete legal title; the defendant had not, for the reasons already stated.

The act of 3d March, 1851, c. 41, section 13, makes it the duty of the surveyor general to cause all private claims which shall be confirmed to be surveyed, and "to decide between the parties with regard to all such confirmed claims as may conflict or in any manner interfere." It is true this may not preclude a legal investigation of the subject by the proper judicial tribunal. In this case there can be no conflict of title as between Las Pulgas and the later grant to Coppinger, which calls for it as a boundary. The survey is conclusive evidence as to the precise location of the western line of Pulgas, as between these parties in this suit. If Coppinger and those claiming under him charge that this line has not been properly established, either by mistake or fraud, they might have had a remedy under the thirteenth section of the act, and may possibly yet have it by filing a bill in chancery. But in this action of eject-

ment, the defendants cannot call upon a jury at their discretion to alter a boundary line which has been legally established by the public officer specially instructed with this duty.

The only other exception is, to the following instruction of the court as to the form of the verdict: "That they should find a separate verdict against such of the defendants as were proved to have been in possession, at the commencement of the suit, of separate distinct parcels of the said land held in severalty, and that the jury might find a general verdict against all the other defendants who were proved or admitted to have been, at the commencement of the suit, in possession of some portion or portions of the premises in controversy, the limits or boundaries of whose possessions were not defined by the proof; and this, whether such possessions and occupation were joint or several."

We can perceive no error in this instruction. Although the circuit court may have adopted the mode of instituting the action of ejectment by petition and summons, instead of the old fiction of lease, entry, and ouster, it is still governed by the principles of pleading and practice which have been \*estab- [\* 277] lished by courts of common law. The hybrid mixture of civil and common-law pleadings and practice introduced by State codes cannot be transplanted into the courts of the United States.

In the action of ejectment, a plaintiff will not be allowed to join in one suit several and distinct parcels, tenements, or tracts of land, in possession of several defendants, each claiming for himself. But he is not bound to bring a separate action against several trespassers on his single, separate, and distinct tenement or parcel of land. As to him they are all trespassers, and he cannot know how they claim, whether jointly or severally; or if severally, how much each one claims; nor is it necessary to make such proof in order to support his action. Each defendant has a right to take defense specially for such portion of the land as he claims, and by doing so he necessarily disclaims any title to the residue of the land described in the declaration; and if on the trial he succeeds in establishing his title to so much of it as he has taken defense for, and in showing that he was not in possession of any of the remainder disclaimed, he will be entitled to a verdict. He may also demand a separate trial, and that his case be not complicated or impeded by the issues made with others, or himself made liable for costs unconnected with his separate litigation.

If he pleads nothing but the general issue, and is found in possession of any part of the land demanded, he is considered as taking defense for the whole. How can he call on the plaintiffs to prove

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how much he claims, or the jury to find a separate verdict as to his separate holding, when he will neither by his pleading nor evidence signify how much he claims? This was a fact known only to himself, and one with which the plaintiff had no concern and the jury no knowledge. If a general verdict leaves each one liable for all the costs, it is a necessary consequence of their own conduct, and no one has a right to complain.

In the case of *McGarvey v. Little et al.*, (not yet reported,) when the same objection was made to the charge of the court, the supreme court of California overruled it, and held, "that [ \* 278 ] \* the defendants being in possession, and there being no proof of the particular portions which they severally occupied or claimed, there was no error in refusing to direct the jury to bring in a separate verdict as to each."

The judgment of the circuit court is therefore affirmed, with costs.

ISAIAH FROST and others, Plaintiffs in Error, v. THE FROSTBURG COAL COMPANY.

24 H. 278.

WHEN A CORPORATION UNDER SPECIAL CHARTER COMES INTO EXISTENCE.

1. Where a charter declared that four persons, whose names are given, and such other persons as may be associated with them, are hereby incorporated and made a body corporate, and it is further declared that, until the first election of directors, those named shall have full power and authority to exercise all the corporate powers of the company, it is held that, after these four have accepted the charter, they can purchase and receive title to land as contemplated in the charter, notwithstanding no stock has been subscribed, or election held, or other person has joined the corporation.
2. On their organization and acceptance of the charter, they constitute the corporation, and can exercise its powers.

WRIT of error to the circuit court for the district of Maryland. The case is fully stated in the opinion.

*Mr. Davis* and *Mr. Shackelford*, for plaintiffs.

*Mr. Price* and *Mr. Pearre*, for defendant.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the circuit court of the United States for the district of Maryland.

[ \* 279 ] \* The action in the court below was an ejectment brought by the heirs of Isaiah Frost, to recover the possession of a



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tract of land situate in the county of Allegany, Maryland. The defense set up was a conveyance of the land by their ancestor to the defendants. The only question in the case is, whether or not the Frostburg Coal Company was capable of taking and holding real estate at the date of the deed, the 13th March, 1845.

The court charged the jury, if they found that Mechack Frost, Isaiah Frost, Thomas J. McKaig, and William W. McKaig, the parties named in the act of incorporation of 1845, accepted the charter, and proceeded to act as a corporate body under it, by the name of the Frostburg Coal Company, opened their coal mines, transported the coal to market, borrowed money on the credit of the company, and made large and costly improvements on the lands in controversy, during all which time Isaiah Frost, the ancestor, acted as one of the directors; and further found, that the said Frost executed and delivered to the company the deed of the 13th March, 1845, given in evidence, they must find a verdict for the defendants.

The act of incorporation, which was passed February 24, 1845, provided that Mechack Frost, Isaiah Frost, Thomas J. McKaig, and William W. McKaig, and such other persons as may be associated with them in the manner afterwards provided, *shall be and they are hereby incorporated and made a body politic and corporate, by the name of the Frostburg Coal Company*, and by that name shall have succession, &c., conferring the usual corporate powers for the manufacture of iron, and mining of coal, and for transporting the same to market; and among others, the power to purchase and hold all such property, real, personal, and mixed, as the company may require for the purposes aforesaid.

The second section provided, that the capital stock of the company should consist of five thousand shares of one hundred dollars each, of which the lands and mines of Mechack Frost, Isaiah Frost, Thomas J. McKaig, and William W. McKaig, on one part, and those who may associate with them \* and con- [ \* 280 ] stitute the aforesaid subscription for stock, payable in money, on the other part.

The third section provided, that the subscriptions to the capital stock should be made at such places, and in such manner, as should be designated by the four persons above named, and that the shareholders of one or more shares of stock should be members of the corporation, and entitled to one vote for each share so held; and making the shares assignable and transferable, as may be provided in the by-laws of the company.

The fourth section provided, that the affairs of the company

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should be managed by a president and four directors, to be chosen by the stockholders, to serve one year, and till others shall be elected; and *until the first election of directors shall be held, the said Mechack Frost, Isaiah Frost, Thomas J. McKaig, and William W. McKaig, shall have full power and authority to exercise all the corporate powers of the said company, &c.*

The fifth section provided, that a general meeting of the stockholders should be held as soon as the company is organized, and annually thereafter, on the first Monday of June in each year, for the election of directors, and to consult upon the business of the company.

On the 12th March, 1845, the associates met in pursuance of the authority given in the third section of the act, at which meeting the whole number of shares, constituting the capital stock, were subscribed, and the company proceeded to the election of the president and four directors, the number required by the charter for the ensuing year; and at the same time, directed that the secretary should procure deeds to the company for the lands, which should constitute part of the capital stock. And on the 21st of the month, the board met, and provided for the issuing of certificates of the capital stock to each stockholder.

It was in pursuance of the resolution of the 12th March, that the deed of Isaiah Frost, the ancestor of the lessors of the plaintiff, was executed. This deed contained some four hundred and sixty-four acres of land, which, together with several parcels conveyed by Mechack Frost, another of the \*stockholders, dated on the same day, and adjoining the former tract, embraced the coal mines of the company, for the working of which it was incorporated.

The company immediately commenced preparations for opening the mines, and for transporting the coal to market, by constructing rail and tram roads leading into the mines, erecting buildings for the accommodation of the workmen, together with other necessary improvements, at an expense of some fifteen thousand dollars; also, a large amount of coal had been taken out of the mines, and sent to the market; all of which was done during the lifetime of Isaiah Frost, and while he was one of the most active and efficient directors, and all or nearly all of said fixtures and improvements had been made upon the parcel of land in question, and for which he had received stock. He was the largest stockholder but one in the company, and had dealt in the stock, by pledging it for money borrowed.

As we have already said, the main ground relied upon, on behalf

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of the heirs, to avoid the deed to the defendants, is the failure to organize under the charter, so as to constitute them a corporation capable of taking and holding real estate. It is supposed that there are some conditions precedent to the existence of the corporation which have not been performed, and that the act, of its own force, did not constitute them a corporate body. But a slight reference to the charter will show that the position is a mistaken one. The first section declares, that the four persons, and such others as may be associated with them, shall be and are hereby incorporated and made a body politic and corporate, by the name of the Frostburg Coal Company; and then confers upon it the usual powers belonging to a corporation, and among others, to purchase and hold real estate for the purposes of the company; and in the fourth section declares, that until the first election of directors shall be held, the four persons named shall have full power and authority to exercise all the corporate powers of the company. The charter took effect immediately on its acceptance by the persons named, and the subsequent steps, such as the subscription of the stock, procurement of the coal \* lands, election of the directors, of [ \* 282 ] the president and secretary, passing by-laws, &c., were steps taken in perfecting the organization, and enabling it to use the powers and privileges conferred for the purposes for which they were granted.

It was supposed in the argument, that the words, "and such other persons as may be associated," &c., in connection with the four persons named in the first section, imported that other persons must be associated with the four, before the charter could take effect; but, if any doubt could be raised upon the language of the first section, the fourth removes it, as there the power and authority to exercise all the corporate powers of the company is expressly conferred upon the four persons, until the first election of directors. These corporate powers are not only conferred upon the four persons named, but are continued until their successors are appointed to take their places. The true meaning of the words referred to in the first section probably is, that a privilege was intended to be given to the company of uniting other associates with the four in the enterprise, if they so elected.

The same observation is also applicable to the second section, which declares that the capital stock shall consist of 5,000 shares of one hundred dollars each, of which the lands of the four persons named in the first section may be one part, and those who may associate with them, and constitute the corporation by subscription for stock, payable in money, the other. The charter does not pro-

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vide that any given amount or portion of the stock shall be in land, or in money, and the true construction probably is, that the whole of it may have been payable in money.

The language of the section would seem to confer upon the four persons the privilege of paying their shares of stock by the conveyance of land, rather than imposing it upon them as an obligation. This is the construction of the charter under which the company has acted, as the subscription for the shares is a moneyed subscription. The land was purchased from two of the principal subscribers, by the company, at a valuation which was applicable to their [ \* 283 ] subscriptions. They \* would be liable to the company for the balance of their stock, as would the other subscribers for the whole amount of theirs.

The subscription of the stock was in form for a given number of shares; but as each share was fixed by the charter at one hundred dollars, the amount each was liable for to the company was readily ascertained, and it is well settled that a subscription in this form is as obligatory as if it had been in money. (14 Wend. R. 20.)

The ninth section of the charter provides, that the corporation shall be subject to all the restrictions imposed by the general act of 1838, regulating incorporations for manufacturing and mining companies. The 15th section of this act provides, that when over four-fifths of the capital stock of the company to which the act applies shall become concentrated, by purchase or otherwise, in the hands of less than five persons, &c., all the corporate powers and privileges granted shall cease and determine. And it is insisted, that the stock of this company, at the time of its organization, was held in violation of this section of the general act. Although the ninth section of the charter subjected the company to the general act, yet the provision is to be construed as subject only, when not inconsistent with the express provisions of the charter; and in this view, the better opinion, we think, is, that this four-fifths provision does not apply. But whether it does or not, it is unimportant to determine; for conceding that it does, a private party cannot take advantage of the forfeiture. That is a question for the sovereign power, which may waive it, or enforce it, at its pleasure. (9 Wend. 382; 4 Denio, 397.)

Without pursuing the case further, the main ground upon which we intend to place the judgment of the court is, that the defendants were made a corporation by the charter, the persons named in it constituting the corporate body, clothed with the powers and privileges conferred upon it, and were capable of taking and holding real estate; and second, even if it were otherwise, and some irregu-

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larities occurred in the organization of the company, inasmuch as no act made a condition precedent to the existence of the corporation has been omitted, or its non-performance shown, a party dealing with \* the company is not permitted to set [ \* 284 ] up the irregularity. The courts are bound to regard it as a corporation, so far as third persons are concerned, until it is dissolved by a judicial proceeding on behalf of the government that created it. (Angel and Ames, sec. 774, and cases referred to.)

Judgment affirmed.

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THE CLEVELAND INSURANCE COMPANY, Appellants, v. GEORGE REED  
and others.

24 H. 284.

STATUTE OF LIMITATION AS TO EQUITABLE RELIEF.

1. Rogers, the defendant, having been in possession, claiming title in fee, for more than ten years before the commencement of this suit to foreclose a mortgage, is entitled to the benefit of the Wisconsin statute of limitations of ten years, in bills for relief in cases of trust not cognizable at common law, and in all other cases not provided for. Bills to foreclose mortgages come under this statute.
2. The fact that Rogers purchased the mortgagers' interest in the land under a sale in bankruptcy proceedings afterwards, does make him a trustee, so as to defeat his adverse title or claim already held.

APPEAL from the district court for the district of Wisconsin.

The case is stated in the opinion.

*Mr. Doolittle*, for appellant.

*Mr. Lynde* and *Mr. Brown*, for appellees.

\*Mr. Justice CATRON delivered the opinion of the court. [ \* 285 ]

The bill seeks to enforce a lien secured by mortgage on twenty acres of land, in what is denominated Finch's addition to Milwaukee. The mortgage debt became due in February, 1839. It is difficult to say, that were the bill standing on demurrer, a sufficient description of the land claimed as bound for the debt could be established to justify an affirmative decree. But the view we take of the case renders this question immaterial.

In 1837, George Reed executed the mortgage to the Cleveland Insurance Company for \$22,000, including the greater portion of a quarter section of land, part of which was covered by previous mortgages to others. These were acquired and foreclosed, and the title vested in James H. Rogers, the purchaser, and only material re-

spondent to this suit. He took possession of the quarter section in 1838, claiming it as his own under previous mortgages of which he was assignee, and which he foreclosed, and became the purchaser of the equity of redemption, and he also claimed title under five tax sales and deeds founded on them.

In his answer, Rogers relies on the act of limitations of Wisconsin, passed in 1839, which provides that "bills for relief in case of the existence of a trust not cognizable by the courts of common law, and in *all other cases* not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and *not after* that time."

To establish the fact of adverse possession, and to negative the conclusion that Rogers did not recognize the trust, the parties agreed "that for the purpose of bringing the above-entitled suit to a hearing at the present term, it shall and may be taken as true and proved for all the purposes of this case, that the defendant, Rogers, has been in actual and continual possession and occupancy of the southeast quarter section 37, township 7, range 22 east, described in the bill of complaint in this suit, since some time in the year 1838, and up to this time; and during all that time has openly controlled the same, and improved some portion of the premises."

To onerate Rogers with the obligation of a mortgager [\* 286] and \*trustee, the complainant introduced a record from the bankrupt court held in Wisconsin, showing the proceedings against George Reed as a voluntary bankrupt under the act of congress of 1841. The proceeding was admitted on the hearing to be in all respects regular. On the 23d of July, 1842, Reed was declared to be a bankrupt, and his property and rights of property were vested in an assignee appointed by the court. He advertised Reed's interest in the property in controversy to be sold, and on the 3d day of May, 1843, it was sold, and purchased by Rogers, he being the best bidder, for the sum of six dollars, who took a regular deed for the same on the 6th day of July 1846, in conformity to the 15th section of the bankrupt law.

The object of introducing this evidence by the complainant was, to avoid the operation of the act of limitations, by showing that, by his purchase, Rogers stood on the same footing of mortgager that George Reed had stood before his bankruptcy, and that the assignee's deed to Rogers was not ten years old when this suit was brought.

The assignee came in as trustee by force of the decree declaring Reed a bankrupt; he held the land as Reed had done, and by the

deed Rogers assumed the same position, because, by the proviso to the 2d section of the bankrupt law, the lien secured by the mortgage was excepted. The main question as regards the effect of this deed is, to what time does the title acquired by Rogers relate. It vested in him by its terms such title as the bankrupt had at the time of his bankruptcy, which was the date of the decree declaring him a bankrupt. To this effect is the 15th section of the act.

This suit was brought in 1856, and the order declaring Reed a bankrupt was made in 1842, so that Rogers held the relation of mortgager to the complainant more than ten years before this suit was brought.

But we deem this proceeding in bankruptcy altogether immaterial. Rogers claimed to own the quarter section in fee, and held it in actual adverse possession in 1839, when the ten years' act of limitations was passed. The act then began to run, and ran on so as to complete the bar in 1849.

\* We do not doubt that the act applies to this suit. [\* 287] The bill prays that the equity of redemption be foreclosed, or that the undivided interest, to the extent of twenty acres in the quarter section alleged to be covered by the mortgage, be sold, and the proceeds appropriated towards paying the debts secured. As neither of these modes of relief are cognizable at law, and the only remedy is in equity, it is manifestly barred by the terms of the act.

By a previous provision of the act of 1839, (section 37,) where there are concurrent remedies at law and in equity, the remedy in equity is barred in the same time that the remedy at law is barred; and what we mean to say is, that the remedies demanded to be enforced by the bill have no corresponding remedy at law, and therefore fall within the 40th section of the act.

As respects the other defendants to the bill, no relief can be had against them. By his purchase of the bankrupt's title, Rogers took the equity of redemption, and cut off all claims to the land the defendants had, assuming the statements in the bill to be true.

We forbear to express any opinion on the defense relied on by Rogers in his answer, namely, that he had purchased and had deeds for the said quarter section from several tax collectors, which he alleges are valid; and if not valid, that they are confirmed by adverse possession and the operation of the three years' act of limitations.

It is ordered that the decree of the circuit court dismissing the bill be affirmed.

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Bissell v. The City of Jeffersonville.

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GEORGE B. BISSELL and others, Plaintiffs in Error, v. THE CITY OF JEFFERSONVILLE.

24 H. 287.

MUNICIPAL BONDS—POWER OF CITIES TO ISSUE THEM.

1. Where the city of Jeffersonville had, by its common council, determined that three-fourths of the legal voters had petitioned them to take stock in a railroad company, and they had resolved to do so, but before the bonds were issued the State court had decided that the law conferred on them no such authority, it was competent for the legislature to authorize the council to ratify their former act and make the contract valid.
2. Where the council, after the passage of the act, ratified the former contract, and recited that it was based on a petition of three-fourths of the legal voters, their act was conclusive against the city in a suit upon these bonds or their coupons by innocent purchasers of them for value.
3. In such case the law vested in the council the power to determine whether the requisite number of voters had petitioned for the subscription to the railroad stock; and in a suit by the innocent holder it is not admissible to prove by extrinsic testimony that the required number had not petitioned.

WRIT of error to the circuit court for the district of Indiana.  
The case is very fully stated in the opinion.

*Mr. Taft, Mr. Perry, and Mr. McDonald*, for plaintiffs.

*Mr. Reverdy Johnson and Mr. Crawford*, for defendant.

[ \* 288 ] \*Mr. Justice CLIFFORD delivered the opinion of the court.

This case comes before the court upon a writ of error to the circuit court of the United States for the district of Indiana. It was an action of assumpsit, and was instituted by the present plaintiffs against the corporation defendants, to recover two installments of interest which had accrued upon certain bonds, purporting to have been duly issued in the name of the defendants, for stock subscribed in their behalf by the common council of the city to the Fort Wayne and Southern Railroad Company. Assuming to act in behalf of the city, the common council subscribed two [ \* 289 ] hundred thousand dollars \*to the stock of the railroad company, and on the twenty-fourth day of April, 1855, issued two hundred bonds, of one thousand dollars each, in the name of the city, and subsequently delivered the same to the railroad company, in payment for the stock previously subscribed. Interest on the whole amount of the loan was to be paid semi-annually in the city of New York, at the rate of six per cent., and coupons or warrants for the same, payable to bearer, were annexed to each separate bond. Plaintiffs became the holders, for value, and in the usual course of their business, of thirty-seven of these bonds; and



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the suit in this case was founded on thirty-seven of the coupons for the first installment of interest, and thirty-six coupons for the second installment. As amended, the declaration contained a count for money had and received, and a special count upon each of the seventy-three coupons. Defendants pleaded the general issue, and also filed a special plea, in bar of the cause of action set forth in the several special counts. More particular reference to the special plea is unnecessary, as it was subsequently held bad on general demurrer, and at the same time the parties went to trial on the general issue.

To maintain the issue, on their part, the plaintiffs, in the first place, introduced one of the original bonds, which is set forth at large in the record. Among other things, it recites, in effect, that it was issued by authority of the common council of the city, and that three fourths of the legal voters thereof "petitioned for the same, as required by the charter." They also gave in evidence, without objection, the several coupons described in the declaration. All of the coupons, as well as the bonds given in evidence, were signed by the mayor of the city, and were countersigned by the city clerk, and the defendants admitted their execution.

Presentment and protest of the coupons for non-payment were also duly proved by the plaintiffs; and to show that the bonds were duly and legally issued, they introduced the records of the common council of the city, and the minutes of their proceedings upon that subject. From that record it appeared that on the twenty-third day of August, 1853, a \* petition of certain legal [ \* 290 ] voters of the city was presented to the common council, representing that the construction of the before mentioned railroad would be of great benefit to the public generally, and especially to the commercial interests of the city, and praying that the board to which it was addressed would subscribe stock in the railroad to the amount of two hundred thousand dollars, and contract a loan for an equal amount, through the issue of city bonds, for the payment of the subscription. That petition purports on its face to have been signed by four hundred and sixty-seven persons, and it recites that they constituted at that time three fourths of the legal voters of the city. On the day of its presentation it was referred by vote of the common council to three members of the board, who reported in effect that they found, upon examination of the petition, and of the poll-book of the last charter election, that the names of more than three fourths of the legal voters of the city were appended to the petition, and they also reported a preamble and resolution to carry into effect the prayer of the peti-

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tioners. Evidently the report of the committee was entirely satisfactory, as the record shows that the resolution was immediately adopted, without alteration or amendment, by the unanimous vote of the board.

Without reproducing the document, it will be sufficient to say that the common council thereby resolved, in case the road came into the city, to subscribe two hundred thousand dollars to the stock of the railroad company, and the preamble, which was adopted as a part of the resolution, expressly affirmed the fact reported by the committee, that more than three fourths of the legal voters of the city had petitioned for that object. Pursuant to that determination, the parties having met, and arranged the terms and conditions of the proposed agreement, a contract was made with the railroad company, that the common council should make the subscription thus authorized, and execute and deliver the bonds of the city to the company for an equal amount in payment for the stock. Throughout the period when these proceedings took place, the parties to them, it seems, had acted upon the supposition that

the fifty-sixth section of the general law of the State for [ \* 291 ] the \*incorporation of the cities fully authorized the defendants, through their common council, to make the subscription and issue the bonds. Before the bonds were issued, however, the supreme court of the State decided, in an analogous case, that no such authority was conferred upon cities by that section. 1 Rev. Stat. 215; *The City of Lafayette v. Cox*, 5 Ind. R. 38.

Some delay ensued in issuing the bonds, apparently in consequence of that decision; but on the 21st day of February, 1855, the legislature of the State passed an additional act to enable cities which had subscribed for stock in companies incorporated to construct works of public utility to ratify such subscriptions. By the first section of that act, the common council of any city which had contracted such obligations or liabilities upon the supposition that they were authorized so to do under the provisions of the former act might, "at any time after the passage of this act, ratify and affirm such subscription;" and upon such ratification it was expressly enacted, that "such subscription, and the obligation and liabilities, and the corporate bonds or obligations issued or to be issued therefor by such city, shall be valid." Sess. Acts, 1855, p. 132. To prove such ratification, the plaintiffs introduced the record of the subsequent proceedings of the common council of the city, showing that at their meeting held on the sixth day of April, 1855, it was resolved by the board, then in session, that the former contract between the city and the before-mentioned railroad com-

pany, "for two hundred thousand dollars, be and the same is hereby confirmed and ratified."

In this connection, the plaintiffs also proved by the same record, that the common council, on the 13th day of April of the same year, authorized and directed the mayor of the city and the city clerk to procure and sign two hundred bonds, of a thousand dollars each, in the name of the city, and deliver the same to the railroad company, reciting in the resolution upon the subject that the proceeding was in accordance with the statute of the State, and the contract and arrangement previously made with the railroad company. Prior to the trial, the court, by the consent of parties, appointed a commissioner to take such evidence as either party might direct \*to have taken, and to report both the [ \* 292 ] evidence and his finding of the facts proved by it, subject to all exception as to the competency of the testimony, and the correctness of his finding. He reported that three-fourths of the legal voters of the city had not signed the petition to the common council, which constituted the foundation of their action in making the subscription to the stock and issuing the bonds. This report was accompanied by the several depositions on which it was founded, and the transcript shows that certain portions of the testimony of the deponents tended to prove the fact reported by the commissioner. Defendants offered the report, with the several depositions, in evidence, to prove, among other things, that the petition in question was not signed by three-fourths of the legal voters of the city. They also offered oral evidence to prove the same fact. To all such testimony the plaintiffs objected, and also moved the court to suppress all such portions of the depositions taken by the commissioner as tended to prove that a less number than three-fourths of the legal voters had petitioned for the subscription to the stock and for the issuing of the bonds. But all of these objections of the plaintiffs were overruled by the court, and the report of the commissioner, with the depositions as taken by him, and the parol testimony, were admitted to the jury, and the plaintiffs excepted to the several rulings in that behalf. Further testimony was then given by the plaintiffs, showing that the bonds in question were negotiated to them for value by the agent of the railroad company; and that the agent, at the time they were received, exhibited to them the certificate of the city clerk, under the seal of the city, giving a condensed statement of the proceedings of the common council from the presentation of the petition to the delivery of the bonds, and affirming, in effect, that all those proceedings appeared of record in the office of the city clerk; and they further proved,

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that he also exhibited to them at the same time another certificate, signed by the mayor of the city and city clerk, showing that the bonds had been exchanged with the railroad company for an equal amount of their capital stock, and affirming that the exchange was authorized by the contract between the parties and the [\* 293] \*resolutions of the common council of the city. After the testimony was closed, the court instructed the jury to the effect that, if they found from the evidence that three-fourths of the legal voters of the city had petitioned for the subscription to the stock, and for the issuing of the bonds, their verdict should be for the plaintiffs; but if they found that three-fourths of the legal voters had not so petitioned, then their verdict should be for the defendants. Under the rulings and instructions of the court, the jury returned their verdict in favor of the defendants, and the plaintiffs excepted to the instructions.

1. On that state of the case the main question presented for decision is, whether it was competent for the defendants to introduce parol testimony to prove that three-fourths of the legal voters of the city did not petition for the subscription to the stock and the issuing of the bonds. That question is raised, as well by the exceptions to the rulings of the court in admitting such testimony as by those taken to the instructions given to the jury.

Some further reference, however, to the law under which the common council acted, in making the subscription and in issuing the bonds, becomes necessary before we proceed to the examination of that question. It is conceded on both sides that the defendants had adopted the general law of the State, entitled an act for the incorporation of cities, before any of these proceedings were commenced. Prior to the adoption of that law by the corporation, the charter of the city authorized the common council to subscribe, in the name of the city, for any amount of stock in railroad or turnpike companies formed, or to be formed, for the purpose of constructing any railroad or turnpike from the city to any other point, provided the stock so held by the city did not, at any time, exceed one hundred thousand dollars; and with that view, they were authorized to borrow money or issue bonds to pay for such stock. But it is admitted by the plaintiffs that the corporation, at the date of the proceedings in question, was duly organized under the subsequent general law for the incorporation of cities, which provides, in effect, that the acceptance of that act by any [\* 294] incorporated city shall be deemed a surrender \*by such city of its prior charter. By the fifty-sixth section of the last-named act it is also provided, that no incorporated city, under

this act shall have power to borrow money, or incur any debt or liability, unless three-fourths of the legal voters shall petition the common council to contract such debt or loan. All of the proceedings in question which led to *the contract* for the subscription to the stock took place under that provision of the charter; and we have already adverted to the fact that the supreme court of the State decided, before the bonds were issued, that, by its true construction, it did not authorize a subscription to the stock of a railroad company. At the argument, the construction adopted by the State court was controverted by the counsel of the plaintiffs. But suppose it to be correct; still the limitation or restriction was one created by the legislature which granted the charter, and certainly it was competent for the same authority to repeal it altogether, or to substitute some other in its place.

Municipal corporations are created by the authority of the legislature, and Chancellor Kent says they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good, and such powers are subject to the control of the legislature of the State. 2 Kent's Com. p. 275.

Whatever may be the true construction of that section of the charter, it is nevertheless certain that it was under that provision that the petition for the subscription was presented to the common council, and it is equally certain that it was under the same provision that they heard and determined the question whether the petition actually contained the signatures of three-fourths of the legal voters of the city. Bad faith is not imputed to the board, nor is it denied that they acted "upon the supposition" that they were authorized by that provision, on "the written petition of three-fourths of the legal voters of the city," to subscribe for the stock and contract to issue the bonds. Having ascertained and determined that three-fourths of the legal voters had petitioned, they adopted the resolution reported by the committee, and entered into the contract with the railroad company. Clearly, therefore, the \*common council had contracted the obligation to take [\* 295] the stock; and in case of refusal, would have been liable in damages for a breach of the contract. Other cities in the State had contracted like obligations under similar circumstances; and to remedy the anticipated difficulty, and to remove the doubt first suggested by the decision of the supreme court of the State, the legislature passed the explanatory act of the twenty-first of February, 1855, to which reference has been made.

Sufficient has already been remarked to show that the circumstances of the case exhibited in the record bring it within the very

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terms of the act; and if so, then the common council might lawfully ratify and affirm the subscription; and upon such ratification it is expressly declared that the bonds issued or to be issued shall be valid.

Mistakes and irregularities in the proceedings of municipal corporations are of frequent occurrence, and the State legislatures have often had occasion to pass laws to obviate such difficulties. Such laws, when they do not impair any contract, or injuriously affect the rights of third persons, are generally regarded as unobjectionable, and certainly are within the competency of the legislative authority. Unlike what is sometimes exhibited in laws of this description, the legislature did not attempt to ratify the subscription, but left the matter entirely optional with the common council, as the representatives of the city, to accept or reject the proffered remedy. They elected to ratify and affirm the subscription; and by so doing, gave the same effect to the contract to subscribe for the stock, and to all the proceedings that led to it, as if the authority to make it had been coeval with the presentation of the petition on which those proceedings were founded. No injustice will result from this conclusion, as it is obvious that the contract had been made in good faith, under the full belief that they were duly authorized to subscribe for the stock, and issue the bonds in the name of the city, so that the only operation of the confirmatory resolution was to give the very effect to the proceedings which

they had intended, but which, from the defect in their [ \* 296 ] authority, had not been accomplished. \* *Watson v. Mercer*, 8 Pet. p. 111; *Wilkinson v. Leland et al.*, 2 Pet. p. 661.

Authority on the part of the common council to subscribe for the stock, and to issue the bonds on the petition of three-fourths of the legal voters of the city, is therefore shown to have existed, and must be assumed in the further consideration of the case. With this explanation as to the authority of the common council, we will proceed to the examination of the main question discussed at the bar.

2. It is insisted by the plaintiffs that the defendants had no right to disprove the verity of their own records, certificates, and representations, concerning the facts necessary to give validity to the bonds. On the other hand, the defendants controvert that proposition, and insist that it was competent for them, under the circumstances, to prove, by parol testimony, that the records given in evidence did not speak the truth, and that, in point of fact, three-fourths of the legal voters had not petitioned, as required by

the charter. Unless three-fourths of the legal voters had petitioned, it is clear that the bonds were issued without authority, as by the terms of the explanatory act it could only apply to a case where the common council of a city had contracted the obligation or liabilities therein specified upon the petition of three-fourths of the legal voters of such city; and if no such petition had been presented, or if it was not signed by the requisite number of the legal voters, the law did not authorize the common council to ratify and affirm the subscription. That fact, however, had been previously ascertained and determined by the board to which the petition was originally addressed.

After the explanatory act was passed, the common council were fully authorized to revise the finding of the former board; and if it did not appear, upon inquiry and proper investigation, that it was correct, it was their duty, as the representatives of the city, to have refused to ratify and affirm the contract for the subscription. Such an inquiry might have been made through the medium of a committee, as it had been when the petition was presented, or in any other mode, satisfactory to the board, which would enable them to ascertain the true state \*of the case. By [\* 297] the terms of the explanatory act they were authorized to ratify and affirm the subscription, if the obligation or liability incurred had been contracted on the petition of three-fourths of the legal voters of the city; and, of course, the necessary implication is, that they must be satisfied that the requisite number had petitioned. In making that investigation, however, it was not required that there should be a new petition, and the law is entirely silent as to the manner in which it was to be conducted. If the common council was composed of the same persons who had already passed upon the question, further investigation was unnecessary, provided they were satisfied with their former determination. Such of the members as knew the record of the fact to be correct might safely act upon their own personal knowledge, without further inquiry; and if there were any who had not been members of the board when the prior determination was made, they might ascertain the fact in any mode which was satisfactory to themselves and their associates. Nothing appears in the record to show whether further information upon the subject was necessary or desirable, or, if so, what means were adopted to obtain it; but it does appear that the board unanimously resolved to ratify and confirm the contract with the railroad company, and subsequently issued the bonds, reciting in each that it was issued by authority of the common council of the city, "three-fourths of the legal

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voters of the city having petitioned for the same as required by the charter." Taken together, we think the record of the resolution ratifying and confirming the contract, and the recital in the bonds, furnish conclusive evidence in this case that the common council did readjudicate the question whether the requisite number of the legal voters of the city had signed the petition. Fraud is not imputed in this case, and it does not appear that it was even suggested at the trial in the court below that the board neglected that duty at the time the contract was confirmed; but the defense was, that the finding was erroneous, because the petition, as matter of fact, did not contain three-fourths of the legal voters of the city.

3. It only remains to consider the effect of that determination \*as between the defendants and the holders for value of the bonds, without notice of the supposed defect in the proceedings under which they were issued, and put into the market. Two hundred bonds, with twelve hundred interest warrants, or coupons, were issued in the name of the city, and the coupons, as well as the bonds, were payable to bearer. Interest was payable semi-annually, but the redemption of the principal was postponed for a period exceeding twenty-five years. Capitalists could not be expected to accept such paper, and advance money for it, unless the authority to issue it was put beyond dispute. They certainly would not pay value for such securities, with knowledge that the question under consideration would be open to litigation whenever payment, either of principal or interest, was demanded. Purchasers of such paper look at the form of the paper, the law which authorized it to be issued, and the recorded proceedings on which it is based. When the law was passed authorizing the common council to ratify and affirm the contract with the railroad company, it must have been understood by the legislature that the bonds were to be received by the company in payment for the stock, and used as a means for borrowing money for the construction of the road, and it could hardly have been expected that the object could be accomplished, if, by the true construction of the act, it contemplated that the bonds should be issued before it was conclusively determined that the requisite number of the legal voters of the city had petitioned the common council. But a much stronger reason why that construction cannot be adopted is, that it would involve an absurdity, as it would render the law altogether inoperative, or else it would admit that the bonds might be issued without authority.

Whether three-fourths of the legal voters had petitioned or not,



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was a question of fact; and if not ascertained and conclusively settled before the bonds were issued, it would remain open to future inquiry, and might be determined in the negative; and clearly the common council could not lawfully ratify and affirm the subscription, unless that proportion of the legal voters had petitioned; and without such ratification, the bonds \* would [ \* 299 ] be invalid. Beyond question, therefore, the construction must be rejected.

Jurisdiction of the subject-matter on the part of the common council was made to depend upon the petition, as described in the explanatory act, and of necessity there must be some tribunal to determine whether the petitioners, whose names were appended, constituted three-fourths of the legal voters of the city, else the board could not act at all. None other than the common council, to whom the petition was required to be addressed, is suggested, either in the charter or the explanatory act, and it would be difficult to point out any other sustaining a similar relation to the city so fit to be charged with the inquiry, or one so fully possessed of the necessary means of information to discharge the duty. Adopting the language of this court in the case of the Commissioners of Knox County v. Aspinwall *et al.*, 21 How. 544, we are of the opinion that "this board was one, from its organization and general duties, fit and competent to be the depositary of the trust confided to it." † Perfect acquiescence in the decision and action of the board seems to have been manifested by the defendants until the demand was made for the payment of interest on the loan. So far as appears, they never attempted to enjoin the proceedings, but suffered the authority to be executed, the bonds to be issued, and to be delivered to the railroad company, without interference or complaint.

When the contract had been ratified and affirmed, and the bonds issued and delivered to the railroad company in exchange for the stock, it was then too late to call in question the fact determined by the common council, and *a fortiori* it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are innocent holders for value.

Duly certified copies of the record of the proceedings were exhibited to the plaintiffs at the time they received the bonds, showing to a demonstration that further examination upon the subject would have been useless; for, whether we look to the bonds or the recorded proceedings, there is nothing to indicate any irregularity, or even to create a suspicion that the bonds had not been issued pursuant to a lawful authority; and \* we hold that [ \* 300 ]

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the company and their assigns, under the circumstances of this case, had a right to assume that they imported verity.

Citation of authorities to this point is unnecessary, as the whole subject has recently been examined by this court, and the rule clearly laid down that a corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with other parties, and cannot, by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims their own conduct has superinduced. *Zabriskie v. the Cleveland, &c., Railroad Co.*, 23 How. 400.

For these reasons, we are of the opinion that the parol testimony was improperly admitted, and that the instructions given to the jury were erroneous. The judgment of the circuit court is therefore reversed, with costs, and the cause remanded, with directions to issue a new venire.

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RECTOR, &c., OF CHRIST CHURCH, PHILADELPHIA, Plaintiffs in Error,  
v. THE COUNTY OF PHILADELPHIA.

24 H. 300.

TAXATION.

1. A statute of Pennsylvania, reciting the previous usefulness of Christ Church Hospital, and the decay of its buildings and embarrassment for funds, and enacting "that the said property, including ground rents, now belonging and payable to Christ Church Hospital, so long as the same shall continue to belong to said hospital, shall be and remain free from taxes," is not a *contract* for perpetual exemption from taxation, but a gratuity subject to the pleasure of the legislature as to its duration.
2. A subsequent statute of the State subjecting that property to taxation in the hands of the hospital does not impair the obligation of any contract.

WRIT of error to the supreme court of Pennsylvania. The case is well stated in the opinion.

*Mr. McCall* and *Mr. Reverdy Johnson*, for plaintiffs.

*Mr. King*, for defendant.

[ \* 301 ] \* Mr. Justice CAMPBELL delivered the opinion of the court.

This cause comes before this court upon a writ of error to the supreme court of Pennsylvania, under the 25th section of the act of congress of the 24th September, 1789. In the year 1833 the legislature of Pennsylvania passed an act which recited "that Christ Church Hospital, in the city of Philadelphia, had for many years afforded an asylum to numerous poor and distressed

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widows, who would probably else have become a public charge ; and it being represented that in consequence of the decay of the buildings of the hospital estate, and the increasing burden of taxes, its means are curtailed, and its usefulness limited," they enacted, "that the real property, including ground rents, now belonging and payable to Christ Church Hospital, in the city of Philadelphia, so long as the same shall continue to belong to the said hospital, shall be and remain free from taxes."

In the year 1851 the same authority enacted "that all property, real and personal, belonging to any association or incorporated \* company which is now by law exempt from taxa- [ \* 302 ] tion, other than that which is in the actual use and occupation of such association or incorporated company, and from which an income or revenue is derived by the owners thereof, shall hereafter be subject to taxation in the same manner and for the same purposes as other property is now by law taxable, and so much of any law as is hereby altered and supplied be and the same is hereby repealed." It was decided in the supreme court of Pennsylvania, that the exemption conferred upon these plaintiffs by the act of 1833 was partially repealed by the act of 1851, and that an assessment of a portion of their real property under the act of 1851 was not repugnant to the constitution of the United States, as tending to impair a legislative contract they alleged to be contained in the act of assembly of 1833 aforesaid.

The plaintiffs claim that the exemption conceded by the act of 1833 is perpetual, and that the act itself is in effect a contract. This concession of the legislature was spontaneous, and no service or duty, or other remunerative condition, was imposed on the corporation. It belongs to the class of laws denominated *privilegia favorabilia*. It attached only to such real property as belonged to the corporation, and while it remained as its property; but it is not a necessary implication from these facts that the concession is perpetual, or was designed to continue during the corporate existence.

Such an interpretation is not to be favored, as the power of taxation is necessary to the existence of the State, and must be exerted according to the varying conditions of the commonwealth. The act of 1833 belongs to a class of statutes in which the narrowest meaning is to be taken which will fairly carry out the intent of the legislature. All laws, all political institutions, are dispositions for the future, and their professed object is to afford a steady and permanent security to the interests of society. Bentham says, "that all laws may be said to be framed with a view to perpetuity ;

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but perpetual is not synonymous to irrevocable; and the principle on which all laws ought to be, and the greater part of them have been established, is that of defeasible perpetuity—a per- [ \* 303 ] petuity defeasible \* by an alteration of the circumstances and reasons on which the law is founded.” The inducements that moved the legislature to concede the favor contained in the act of 1833 are special, and were probably temporary in their operation. The usefulness of the corporation had been curtailed in consequence of the decay of their buildings and the burden of taxes.

It may be supposed that in eighteen years the buildings would be renovated, and that the corporation would be able afterwards to sustain some share of the taxation of the State. The act of 1851 embodies the sense of the legislature to this effect.

It is in the nature of such a privilege as the act of 1833 confers, that it exists *bene placitum*, and may be revoked at the pleasure of the sovereign.

Such was the conclusion of the courts in *Commonwealth v. Bird*, 12 Mass. 442; *Dale v. Governor*, 3 Stew. 387; *Alexander v. Willington*, 2 Russ. and M. 35; 12 Harris, 232; *Lindley’s Juris. sec. 42*.

It is the opinion of the court that there is no error in the judgment of the supreme court, within the scope of the writ to that court, and its judgment is affirmed.

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WILLIAM WIGGINS and others v. JOHN B. GRAY and another.

24 H. 303.

## CERTIFICATE OF DIVISION OF OPINION.

1. It was not the intention of the act of 1803 to give jurisdiction of matters of mere practice or sound discretion in the circuit court of which this court could not take jurisdiction by writ of error.
2. Therefore, a question as to whether the circuit court could, on motion, set aside a decree of a former term, cannot be so removed, because it lies in the discretion of the court to entertain the motion, or require a resort to regular petition or a new bill.

THE case comes up on certificate of division of opinion between the judges of the circuit court for the northern district of California. The matter on which the division rested is well stated in the opinion.

*Mr. Bayard and Mr. Collier*, for plaintiffs.

*Mr. Walker and Mr. Cushing*, for defendants.

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\* Mr. Chief Justice TANEY delivered the opinion of the [ \* 304 ] court.

This case comes before the court upon a certificate of division of opinion between the judges of the circuit court for the district of California, sitting as a court of equity.

In stating the facts upon which the question certified arose, the court gives a history of the case, and it appears that a bill was filed in a State court of California, and was afterwards removed to the district court of the United States, by order of the court, pursuant to an agreement made by the counsel for the respective parties; that before it was transferred from the State court, one of the complainants and one of the defendants died; and the representatives of neither of them were afterwards made parties, either in the State court before the removal, or the district court of the United States, after the case was transferred to that court. And in this condition of the case, and without these parties, a final decree was rendered in the last-mentioned court. These proceedings were transferred to the circuit court of the United States, under the act of congress of April 30, 1856; and a bill was afterwards filed in that court to set aside and vacate the final decree which had been rendered as above mentioned; but in that proceeding the circuit court held that it had not jurisdiction, because the parties made defendants resided in New York, where the process of the court could not lawfully be served upon them. The dates of these several proceedings in the different courts, and the motions and agreements of counsel, are particularly \* set forth in the state- [ \* 305 ] ment; but they are not material to the decision of this court, and need not, therefore, be repeated here.

The circuit court further certify, that after all of these proceedings were had, and the bill filed against the citizens of New York dismissed, a motion was made "to vacate the final decree rendered, and to remand the case to the State court, in which it originated; and that the motion was predicated on the ground that the whole proceedings, from the time the case was transferred thence, including the decree, were null and void, and not merely voidable, and therefore might be set aside on motion."

Upon this motion the judges divided in opinion, as they certify, upon the following question: "whether, under the circumstances detailed, this court (the circuit court) has authority to vacate summarily, on motion, the decree of the district court of the United States for the northern district of California, and remand the case to the third judicial district of the State."

It will be observed, that the grounds upon which the decree of

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the district court is alleged to be void, or voidable, are not stated, nor the questions which arose in the State court, or the courts of the United States; nor does it appear what errors are supposed to have been committed, which it is proposed to bring for revision before the circuit court, and to correct by a summary proceeding on this motion.

The only question certified by the circuit court is, whether, under the circumstances of the case as detailed in the statement, it could proceed summarily on motion to vacate and declare void the decree. The inquiry obviously relates altogether to the practice of the court as a court of equity. And this question often depends upon the sound judicial discretion of the court, regulated by the rules prescribed by this court, and the general principles and established usages which govern proceedings in a court of chancery; and whether it will proceed in a summary manner on motion, or require plenary proceedings by bill and answer, must [ \* 306 ] depend upon the particular \*circumstances of the case before it, and the object sought to be attained.

The act of 1802, chap. 32, which authorizes the certificate of division, evidently did not intend to give this court jurisdiction, in that mode of proceeding, upon any question of common law or equity, that would not be open to revision here upon writ of error or appeal. It was so decided in *Davis v. Braden*, 10 Pet. 288, and in *Parker v. Nixon*, 10 Pet. 410. And it has repeatedly been held that the decision of the inferior court, upon a question depending upon the exercise of a sound judicial discretion in a matter of practice as to the mere form of proceeding, is not open to revision in this court.

If the judges had united in refusing the summary proceedings on motion, it is very clear that the decision could not have been revised in this court upon appeal, although this tribunal might be of opinion that the relief sought might have been legitimately granted in that mode of proceeding; for this discretion in a matter of practice resting exclusively with the inferior court, it has the right to determine for itself whether it will proceed in a summary way, or refuse to do so whenever it thinks the purposes of justice will be better accomplished in a plenary proceeding by bill and answer; and consequently no appeal will lie from its decision, made in the exercise of this discretionary power. In the case before us, by the division of opinion between the judges, the motion was as legally and effectually refused as if both had concurred in the refusal. And as the decision in the latter case could not have been reviewed here upon appeal, for want of appellate juris-

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diction over such questions, we should hardly be justified in assuming jurisdiction, and exercising appellate powers over the same questions when they come before us on a certificate of division.

Besides, the act of 1802 obviously contemplates a suit in court, in which plaintiff and defendant have both appeared, for it directs the point to be certified at the request of either party. But here there is no party but the one in whose behalf the motion is made. No defendant is named, and no process prayed for. And if, in this stage of the case, the legality of \* this proceed- [ \* 307 ] ing can be certified to this court for its opinion, the same thing may be done at the commencement of any other equity proceeding, and this court called on to decide in advance, before any process is issued or any party brought into court, whether a motion, or an original bill, or any other of the many descriptions of bills known in equity practice, was the proper and appropriate remedy in the case which a party was about to bring before the circuit court. No one will suppose that such a practice was intended to be established by the act of 1802.

The court order and adjudge that this opinion be certified to the circuit court, and that the cause be remanded.

#### THE STEAMSHIP PENNSYLVANIA.

THE UNION STEAMSHIP COMPANY OF PHILADELPHIA v. THE NEW YORK AND VIRGINIA STEAMSHIP COMPANY.

24 H. 307.

#### ADMIRALTY—COLLISION.

1. It is a fault for which a steamship must be held responsible, when a collision is produced by the mistake of the pilot in putting the helm to the starboard, because he supposed his vessel was backing, when in fact she was moving forward at the rate of six miles an hour.
2. Inevitable accident is not to be presumed solely from the circumstances attending the imminence of the collision, but is to be determined by all the circumstances affecting the skill and care with which the vessel is navigated, as she comes within the distance of possible collision.

APPEAL from the circuit court for the eastern district of Virginia. The case is fully stated in the opinion.

*Mr. Kane*, for appellants.

*Mr. Watson*, for appellees.

\* Mr. Justice CLIFFORD delivered the opinion of the court. [ \* 308 ] This is an appeal from a decree of the circuit court of

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the United States for the eastern district of Virginia, sitting in admiralty. The libel was filed in the district court, by the appellees, on the thirteenth day of June, 1855. It was a proceeding *in rem* against the steamship Pennsylvania, and was instituted to recover compensation for certain damage done to the steamship Jamestown, by means of a collision which occurred between those steamers in Elizabeth river, on the night of the seventh of January, 1855, some five or six miles below the port of Norfolk, in the State of Virginia. At the time of the collision, the Jamestown was on her regular weekly trip from the port of Norfolk to Richmond, in the same State, and the Pennsylvania was proceeding up the river to Norfolk, in the prosecution of her regular semi-monthly trip from Philadelphia to her place of destination. Libelants allege that the Jamestown was pursuing her usual and proper course down the river, and that the collision occurred in consequence of \* the improper and unskillful management of those in charge of the other steamer. Process was duly served, and the respondents appeared and answered to the suit. They admitted the collision, but alleged, in effect, that it occurred in consequence of the intense darkness of the night, occasioned by a dense fog, without any such negligence or fault as is alleged in the libel, and in spite of every possible precaution on the part of those in charge of their steamer to prevent it. A decree was entered for the libelants in the district court, which was affirmed, on appeal, in the circuit court, and thereupon the respondents appealed to this court. It is now conceded by the respondents that the collision was not occasioned by any fault on the part of those in charge of the injured vessel, but it is insisted in their behalf that the colliding steamer was also without fault, and that the collision was the result of inevitable accident. To establish that defense, they rely entirely upon the character of the night, as shown by the evidence, and the circumstances attending the disaster. From the evidence, it appears that the Jamestown left the wharf at Norfolk on the seventh of January, 1855, about eleven or half past eleven o'clock at night, as alleged in the libel. When she started there was a thick fog in the harbor, but she met with no difficulty in passing out, and it so far cleared away in about half an hour that those in charge of her deck, as she proceeded down the river, could see the lights and even the hulls of vessels ahead, and the land on the eastern shore. Several witnesses also testify that the moon had risen, and that stars were occasionally visible, though they admit that it was still quite foggy, and that there was a heavy mist on the water. Two competent look-outs were accordingly stationed



at the usual place in the forecastle, and the signal-lights of the steamer were properly displayed. Those precautions had been taken at the time the steamer left the wharf, but about the time she passed the naval hospital, the master, as he had been accustomed to do on similar occasions, left the quarter-deck, and took a position in the rigging of the steamer, some ten feet above the hurricane-deck. Leaving the look-outs properly stationed in the forecastle to perform their usual duties, he \*doubt- [ \* 310 ] less chose that more elevated situation to get a less obstructed view of distant objects, and he testifies that he could then see a mile and a half ahead, and the evidence furnishes no good reason to doubt the truth of his statement.

Intending to take the eastern side of the channel, another precaution also became necessary, so as not to incur the hazard of running the steamer aground; and to guard against any such danger, he directed the mate to heave the lead at short intervals, and to report to him the soundings; and the order was faithfully obeyed. Having taken these precautions, he continued to prosecute the voyage at a moderate rate of speed, sometimes stopping the engine when the fog shut in, and occasionally ringing the bell and sounding the whistle; and the steamer, pursuing her regular course, rounded Lambert's point in perfect safety, passing so near to the buoy located there that it was seen by the master from his position in the rigging, and particularly noticed. On arriving there, it was necessary to change the course of the steamer; and inasmuch as he had noticed the buoy, he was enabled to perform that duty without danger of mistake. Orders were accordingly given to the wheelsman to set the course north one-fourth east, and to run by the compass. During all this time the master remained in the rigging, and he testifies that after the steamer rounded the point, he could see from the buoy to Craney Island light-ship, which, according to his estimate, is a mile and a half. Presently, however, as the steamer advanced, he saw another light, on the larboard bow of the steamer, and finding upon inquiry that the wheelsman had not seen it, he called his attention to the fact that there were two lights, expressing the opinion, at the same time, that the one last discovered was the light of the Pennsylvania coming up the river. His own steamer at that time was heading north, half east, and he directed the wheelsman to port the helm, so as to keep both lights well on the larboard bow, which had the effect to gradually sheer the steamer still closer to the eastern side of the channel. She had previously been running in about four fathoms of water, but the mate soon re-

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ported that the soundings showed only three, and as she [ \* 311 ] \*advanced, he informed the master that there was but two and a half fathoms, and cautioned him that there was danger of running aground. At this time the master saw the signal-lights and hull of the Pennsylvania, as she passed the light-ship, on the western side of the channel. Immediate orders were then given to ring the bell and sound the whistle, and the master testifies that the signals were answered from the approaching steamer. Shortly afterwards, the mate reported that the soundings showed but ten feet of water, and immediately upon receiving that information he gave the necessary orders to stop the machinery, and reverse the engine. Both orders were promptly obeyed, and it was then the master first discovered that the approaching steamer had altered her course, and was heading diagonally across the channel towards the Jamestown. They were then less than a quarter of a mile apart, and seeing that a collision was almost inevitable, he instantly directed the alarm-bell to be rung, and the whistle of the steamer to be sounded; and as there was nothing more that he could do to avoid the danger, he gave warning to the men in the fore-castle, and left the rigging, and returned to the quarter-deck. Further reference to the circumstances preceding the collision, so far as respects the injured steamer, is unnecessary, at this stage of the investigation. According to the evidence, it seems that the Pennsylvania arrived off Cape Henry at an early hour in the evening of the day of the collision, but in consequence of the fog and the difficulties of the navigation she did not enter the river till after eleven o'clock at night. She proceeded up the river at the rate of about six miles an hour, and the mate, who was the acting pilot after she entered the river, and had charge of her deck, admits that she ran very close to the before-mentioned light-ship, and that her course at that time was south, half east, and it is not possible to doubt that if she had continued on that course a short time longer, all danger would have been avoided. Such, however, was not the fact, as is clearly shown by the pilot himself, and we refer to his testimony in preference to that of the [ \* 312 ] master, because the latter remained in the \*saloon until just before the collision occurred. Among other things, the pilot admits, that shortly after his steamer passed the light-ship, he gave the order to starboard the helm; and what seems even more remarkable, in cases of this description, he acknowledges that he gave the order after he knew that another steamer was approaching, though he denies that he had seen her lights. His theory is, and he accordingly testifies, that he first gave the order

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to stop and back; and inasmuch as that order had been executed, and the steamer had actually commenced to back, that putting the helm a-starboard had the same effect as porting the helm would have produced if the steamer had been going ahead. But it is a sufficient answer to that theory, as applied to this case, to say that the evidence shows beyond the reach of doubt, that the steamer was still advancing at the rate, at least, of three or four miles an hour, so that, upon his own theory, he committed an error, and according to his own testimony he committed it with a knowledge of the approaching danger. Three or four witnesses, including the master of the colliding steamer, testify that she was advancing three or four miles an hour when the collision occurred, and the damage done to the injured steamer proves to a demonstration that her headway must have been very considerable. On the contrary, the injured steamer had nearly stopped, and being already as close to the eastern side of the channel as the means of navigation would allow, she was almost as powerless to prevent the collision as if she had been lashed to the wharf from which she started. It was under these circumstances that the two steamers came together, and the evidence shows that the colliding steamer struck the other on the port-bow near the forward gangway, some thirty or forty feet abaft the stem. As described by the witnesses, it was a full blow at right angles, and had the effect to force the stem of the colliding steamer some six feet into the hull of the other, tearing up the deck of the forecastle a third part of the way across the vessel, and breaking into two pieces six or eight of the largest timbers. Looking at the whole circumstances of the collision, it is vain for the respondents to suppose that

\* this court can hold that it was the result of inevitable [\* 313] accident. Where the collision occurs exclusively from natural causes, and without any negligence or fault, either on the part of the owners of the respective vessels, or of those intrusted with their control and management, the rule of law is, that the loss must rest where it fell, on the principle that no one is responsible for such an accident, if it was produced by causes over which human agency could exercise no control. *Stainback et al. v. Rae et al.* 14 How. 533; 1 Pars. M. L. 187. But that rule can have no application whatever to a case where negligence or fault is shown to have been committed on either side; for if the fault was one committed by the libellant alone, proof of that fact is of itself a sufficient defense; or if the respondent alone committed the fault, then the libellant is entitled to recover; and clearly, if both were in fault, then the damages must be equally apportioned between

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them. Plainly, therefore, it is only when the disaster happens from natural causes, and without negligence or fault on either side, that the defense set up in this case can be admitted. Inevitable accident, as applied to cases of this description, must be understood to mean "a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident. *The Locklibo*, 3 W. Rob. 318. *The John Frazer*, 21 How. 184. It is not inevitable accident, as was well remarked by the learned judge in the case of the *Juliet Erskine*, 6 Notes of Cases, 634, where a master proceeds carelessly on his voyage, and afterwards circumstances arise, when it is too late for him to do what is fit and proper to be done." He must show that he acted seasonably, and that he "did everything which an experienced mariner could do, adopting ordinary caution," and that the collision ensued in spite of such exertions. *The Rose*, 7 Jur. 381. Unless the rule were so, it would follow that the master might neglect the special precautions which are often necessary in a dark night, and when a collision had occurred in consequence of such neglect, he might successfully defend himself upon [ \* 314 ] \*the ground that the disaster had happened from the character of the night, and not from any want of exertion on his part to prevent it. *The Batavier*, 40 Eng. L. and Eq. p. 25. *The Europa*, 2 Eng. L. and Eq. 564. *The Mellona*, 5 Notes of Cases, 558. Applying these principles to the present case, it is obvious that the defense set up by the respondents cannot be sustained. They not only fail to show that the steamer was without fault, but the testimony of those in charge of her incontestably proves that they were guilty of negligence in more than one particular. Both steamers were in the prosecution of their regular and stated trips, and of course those in charge of them knew, or ought to have known, that they were liable to meet each other on the route; and if it was so dark that the lights of an approaching steamer could not be seen, it was negligence in the master, while his steamer was proceeding at the rate of six miles an hour, to remain in the saloon, wholly inattentive to the peculiar dangers incident to the character of the night; and if it was not unusually dark, then it is clear that there was gross negligence on the part of those in charge of the deck. It is shown by the evidence, that the colliding steamer had two look-outs; but it is not shown what, if any, duty they performed in the emergency, or that any inquiries were made of them, either when the course of the steamer was changed near the light-ship, or when the pilot heard the noise

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made by the wheels of the approaching steamer. But the great fault committed on the occasion was that of putting the helm to starboard, instead of keeping the course or porting it when it became known that the other steamer was approaching; and the excuse given for it by the pilot, that he supposed his own steamer was backing, only adds to the magnitude of the error, as it shows that the order was given without knowing what its effect would be, which could only have happened from indifference or inattention to duty.

For these reasons, we are of the opinion that the decision of the circuit court was correct, and the decree is accordingly affirmed, with costs.

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JOHN T. MARTIN and others, Plaintiffs in Error, v. W. H. THOMAS and others.

24 H. 315.

SURETIES RELEASED BY ALTERATION OF BOND.

Where a bond for the release of property secured in replevin was given to the marshal who held it under the writ of replevin, and he permitted one of the principals in the bond, with his consent, to erase his name from it, this discharged the sureties in the bond from all liability on it.

WRIT of error to the district court for the district of Wisconsin.

*Mr. Doolittle* and *Mr. Ewing*, for plaintiffs.

*Mr. Reverdy Johnson* and *Mr. Hopkins*, for defendants.

\* Mr. Justice McLEAN delivered the opinion of the court. [ \* 316 ]

This is a writ of error to the district court of the United States for the district of Wisconsin.

The action was replevin; the pleadings being filed, a jury was called, who rendered a verdict in damages for nine thousand seven hundred and eighty dollars and ninety-six cents, with costs.

In the course of the trial a bill of exceptions was filed, on which the questions of law were raised. Be it remembered, that at the trial of the above entitled action, the plaintiff produced an instrument in writing in the words and figures, and with interlineations and erasures following, to wit :

Know all men by these presents, that we and John T. Martin, and John Keefe, and Andrew Proudfit, are held and firmly bound unto Major J. Thomas, marshal of the United States for the Wis-

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consin district, in the sum of twenty thousand dollars, to be paid, &c.

Whereas the defendants have required the return of property replevied by the marshal, at the suit of George T. Rogers against Henry M. Remington and John T. Martin, jun.; now, [ \* 317 ] \* the condition of this obligation is such, that if the said defendants in said suit shall deliver to the marshal said property, if such delivery be adjudged, and shall pay to him such sum as may for any cause be recovered against the defendants, then this obligation to be void.

The bond upon which judgment was recovered was void, as against the defendants, because, after the same was executed by them as sureties, Remington, their principal, without their knowledge or consent, and with the consent of the marshal, erased his name from the bond.

In *Miller v. Stuart*, 9 Wheat. 702, Mr. Justice Story said, nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended, by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances, pointed out in the obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and an alteration of it is made, it is fatal.

*Hunt's Adm. v. Adams*, 6 Mass. 521.

2. After the execution of the bond by the defendants, to be delivered to the marshal, it was refused and disagreed to by him, and it thereby became void. Any subsequent alteration would require a new deed or positive assent to the same, to make it valid against the defendants.

*Sheppard's Touchstone*, 70, 394.

The judgment is reversed.

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CHARLES F. MAYER, Trustee and Appellant, v. WILLIAM PINKNEY WHITE, Administrator, and others.

24 H. 317.

ILLEGAL CONTRACTS, SUBSEQUENTLY MADE GOOD.

This court, following the decision of the court of Maryland, held, in the case of *Gooding v. Oliver*, 17 How. 274, that the contract of the Baltimore Company with Mina, to furnish means to make war against Spain, was void, and the assignee in insolvency

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had no rights under such contract made by his insolvent. But Mexico, after her independence, having by treaty agreed to pay the claimants under the Mina contract, the claim is relieved from this taint of illegality, and passes to the assignee in insolvency proceedings instituted on another insolvency subsequent to this agreement to pay by Mexico.

APPEAL from the circuit court for the district of Maryland. The case, which grows out of the contract with Mina by the Baltimore Company, has already been before the court several times. (See *Gooding v. Oliver*, 17 How. 274.) In its present aspect it is sufficiently stated in the opinion.

*Mr. Mayer* and *Mr. Reverdy Johnson*, for appellant.

*Mr. Dulany* and *Mr. Campbell*, for appellees.

\*Mr. Justice NELSON delivered the opinion of the court. [ \* 319 ]

This is an appeal from a decree of the circuit court of the United States for the district of Maryland.

The bill was filed in the court below by Charles F. Mayer, the surviving trustee of John Gooding, appointed under certain proceedings instituted by Gooding before the commissioners of insolvent debtors for the city and county of Baltimore, for the benefit of the insolvent laws of Maryland, in October, 1829. Gooding was an original owner of a share in what is known as the Baltimore Mexican Company, which, in 1816, furnished General Mina with the means to fit out a warlike expedition against Mexico, then a province of Spain. The expedition failed, and Mina perished with it soon after he landed. Mexico having subsequently achieved her independence, the company made application to the new government to assume the debt, which it did, by a decree of the 28th June, 1824; but payment was delayed, from time to time, until this, with other claims against the government, were adjusted and discharged, under the convention between this government and Mexico, of April, 1839. The share of Gooding, which was one-ninth of the interest in the contract of Mina, amounted, at the time of its allowance by the commissioners under this convention, to the sum of \$39,381.82. The complainant claims this amount, with interest, under the insolvent assignment made by Gooding for the benefit of all his creditors, as already stated, under the insolvent laws of Maryland, in 1829.

The defendant, White, the administrator *de bonis non* of Gooding, sets up a title to the fund as the personal representative of the estate, and claims it as part of the assets which belong to the heirs and distributees.

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[ \* 320 ] \*The history of the litigation among the several claimants to the money, awarded to the Baltimore Company by the commissioners, under the convention with Mexico, (amounting to the sum of \$354,436.42,) of which the fund in controversy is a part, will be found in the 11th How. 529; 12 Ib. 111; 14 Ib. 610; 17 Ib. 234; and 20 Ib. 535.

In the case of John Gooding, administrator *de bonis non* of John Gooding, deceased, v. Charles Oliver and others, executors of Robert Oliver, (17 How. 274,) the present fund was in controversy between the administrator of the estate, claiming it as assets, and the representatives of Robert Oliver, claiming it by virtue of a purchase from an insolvent trustee, under proceedings instituted by Gooding for the benefit of the insolvent act of Maryland in 1819. As between these parties the court held, that the administrator was entitled to the fund as assets of the estate. The reasons for this decree will be found in the report of the case referred to.

Gooding, as has been already stated, again took the benefit of the insolvent act in 1829, and the question now is between the trustee appointed under these insolvent proceedings, as assignee of his estate for the benefit of creditors, and the present administrator *de bonis non*, the personal representative.

The executors of Oliver, who claimed under the trustee in the first insolvent proceedings in 1819, failed to hold the fund against the personal representative in the case referred to, upon the ground the courts of Maryland had decided that the contract of the Baltimore Company with General Mina, which had been made in violation of our neutrality laws, was so fraught with illegality and turpitude, and so utterly null and void, that no claim to, or interest in it, passed under their insolvent laws to the trustee; and such being the construction of a statute of Maryland by her own courts, this court, according to the established course of decision, felt bound by it, and consequently the insolvent trustee took no interest in the Mina contract, nor Robert Oliver, or his personal representatives, who claimed under him.

The case now comes before us between the trustee in [ \* 321 ] the \* insolvent proceedings of 1829, under the assignment for the benefit of creditors, and the present personal representative of the estate of Gooding, the former in the meantime having died; and the principal question is, whether or not this trustee took the interest of the insolvent in the Baltimore Company in 1829, by virtue of these proceedings. If the interest is to be regarded in the same condition as it stood, according to the judgment of the Maryland courts, at the time of the former insolvent



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proceedings, our former conclusion must be the same as in the case of Gooding, Administrator, v. the Executors of Oliver. The personal representative would be entitled to the fund.

It is insisted, however, by the learned counsel, on behalf of the trustee, that the state and condition of this interest had in the meantime changed, and had become an admitted legitimate demand or debt against the Mexican government, wholly exempt from any taint of illegality or turpitude, and hence to be regarded as property of the insolvent, to be devoted to the benefit of his creditors.

This interest or demand, as it stood in 1819, at the time of the first insolvent assignment, as we have seen, arose out of a contract between the Baltimore Company and General Mina, which, as admitted, was illegal, being in violation of our neutrality laws. Whether that constituted a valid objection to the assignment under the insolvent laws of Maryland, for the benefit of creditors, is not a question now before us. The affirmative was held by a court having jurisdiction to decide it. If an original question, we should not have had much difficulty in disposing of it. This contract, then, stood simply upon the personal obligation of Mina, and as between the parties it was void and of no effect, if Mina or his legal representatives chose to avail themselves of its illegality. But Mexico, after she had gained her independence in 1824, assumed the debt due to the Baltimore Company as one of national obligation, which had been contracted for the service and benefit of the nation by a general declared *bene meritos de la patria*. The assumption was the free act of a sovereign power, and wholly independent of the question as to the legal qualities or character \* of the debt, as viewed under the statute or [ \* 322 ] common law of the country in which it originated. It was assumed by the congress of Mexico, upon public political considerations, in favor of persons who had contributed their means in support of the struggle which resulted in the achievement of her independence, and the obligation rests not upon the contract of General Mina, or municipal regulations, but upon the decree of the sovereign power and public law of the nation.

We may add, that after the recognition and adoption of this claim by the Mexican authorities, the government of the United States, through its minister to that country, made it the subject of negotiation on behalf of the parties in interest, who were citizens, for the purpose of procuring indemnity for the same, and which resulted, as has been already stated, in its satisfaction, under the convention of 1839.

We have no difficulty, therefore, in holding that the demand in

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1829 constituted a right of property or interest in Gooding, the insolvent, that passed to the plaintiff as trustee, by virtue of the assignment under the insolvent proceedings of 1829. The case of *Comegys et al. v. Vase*, (1 Peters, 193, 216, 218, 220,) is a full authority upon this point.

As to the objection that the plaintiff is concluded by the decision of this court in the case of the former, *Administrator of Gooding v. The Executors of Oliver*, reported in the 17th How. 274, one of the questions decided in that case furnishes a conclusive answer to it. We need not repeat the reasons or authority which led this court to its conclusion, which are there stated at large.

The decree of the court below reversed and remanded, with directions to enter a decree for the plaintiff against the administrators of Gooding, deceased, in pursuance of above opinion and stipulations of parties.

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JOHN M. FACKLER, Appellant, v. JOHN R. FORD and others.

24 H. 322.

## CONSTRUCTION OF STATUTES—FRAUD.

1. The fourth section of the act of March 31, 1830, was intended to protect the government against secret and fraudulent combinations of bidders for the public lands, and the fifth for the protection of *bona fide* bidders, or those who intend to bid against such practices.
2. Neither of them can be used by a purchaser at such sales to defraud the party from whom he received the money to bid, and to whom he made a fair contract to convey a part of the land so purchased.
3. Such fraud, if practiced by the purchaser, is no defense against the performance of an honest contract with another person.

APPEAL from the supreme court of the territory of Kansas. The facts of the case are well stated in the opinion.

*Mr. Carlisle* and *Mr. Badger*, for appellant.

*Mr. Ewing* and *Mr. Coombs*, for appellee.

[ \* 328 ] \* Mr. Justice GRIER delivered the opinion of the court.

Ford and others are complainants in a bill for specific performance of a contract made by them with Fackler & Mills.

The bill charges that on and before the 22d of November, 1856, Fackler claimed, as actual settler thereon, a fractional section of land containing sixty acres, and Mills the east half of a quarter section, containing eighty acres, in Leavenworth county, Kansas

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territory, being parts of the land purchased by the government of the United States of the Delaware Indians.

These lands had been appraised at eight dollars an acre, and advertised for sale pursuant to law. That prior to that date, Fackler & Mills surveyed and laid off said tracts of land so claimed and held by them, into blocks, lots, public grounds, streets, alleys, &c., for a town to be known as "Fackler's addition" to Leavenworth city; that they made a plat of it and divided the whole into eighty shares of six lots each, executing certificates, on the back of each of which they indorsed the lots assigned; that they also represented themselves to be owners of a ferry right from the south part of Fackler's addition to and including a landing on the opposite side of the Missouri river, and a lease of a fractional section in Platte county, in Missouri, containing thirty-four acres; that Fackler & Mills were anxious to sell and dispose of the undivided half of the ferry, together with an equal and divided half in lots of the 140 acres, being 40 shares, containing in the aggregate 240 lots; that on the 22d of November, 1856, they entered into covenant, under seal, to sell to complainant 40 shares, being one-half of 140 acres in Fackler's addition to Leavenworth city, which shares were divided and agreed to be the following lots, viz: 23, &c., &c., &c.; that the complainants have paid the sum of \$10,000 as a consideration, and agreed to furnish one-half the purchase money to be paid at the Delaware sales; that Fackler & Mills agreed to make a quitclaim deed to the vendees when they have obtained a title for the lands, and as \*part consideration of said pay- [\* 329] ment, a deed for the undivided half of the ferry right and lease of grounds on the Missouri side should also be executed.

At the bottom of this agreement, of the same date, is a receipt by Fackler for \$560, "being one-half of the appraised value of the lands described in the within contract, which we are to use in paying for the said lands at Delaware sales, held at Leavenworth this day.

The bill further charges that Fackler & Mills did obtain a title for said land, and now refuse to convey to complainant either the land or the moiety of the ferry right, and prays for a decree for specific performance.

The respondents demurred to this bill, and afterwards withdrew their demurrer and filed an answer. The answer admits the contract and receipt of the money, and purchase of the lands, but charges that the government of the United States was trustee of the Delaware Indians of these lands, and that the act of the officers of the government in fixing the value of the land, and in restrict-

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ing the purchase thereof to settlers thereon, to such valuation, was a "fraud on the Indians," and that the plaintiffs were cognizant of such fraud; that the lands were appraised far below their true value; that respondents have not put the plat of their town on record; that therefore the description of the land is so vague and uncertain that a court cannot decree a specific performance; that a statute of Kansas requires all town plats to be recorded; that besides the money paid to the respondents, there was a parol representation made by complainants; that by their capital and influence they had built up other towns in the west, and would do the same with this if they could get a large interest at low rates; and that not having performed this part of their contract, respondent refused to make them a title; and lastly, the answer concludes with the following defense and apology:

"And this defendant says, that inasmuch as the plaintiffs have endeavored to avail themselves of a supposed technical legal advantage to aid them in a non-compliance with their contract, and have failed to comply with the same, defendant in turn claims [ \* 330 ] that he is justified in charging, and does charge \* and insist, that said contract was made before the relinquishment of the Delaware Indians to said land, and in violation of the said treaty with said Indians; and that said agreement, settlement, survey, and *platte* of said land were each in violation thereof, and in violation of the laws of the United States, and in violation of the statutes of the territory of Kansas, and in violation of the public policy of the United States, and void."

Afterwards, on motion of complainants, the court ordered to be expunged from the answer each one of the charges, a summary of which we have just given. This left in the answer nothing but an admission of the charges in complainants' bill.

A bill of exceptions (according to the practice of that court) was taken to this order of the court, and the case was then heard on the bill, answer, and exhibits, and a decree was entered for complainants, which was confirmed on appeal to the supreme court of the territory.

The allegation that the United States defrauded the Indians, and that the lands were sold below their value, and consequently that Fackler, having got his title by a fraud, was bound to commit the further fraud of keeping the complainants' money and the land too, might well have been expunged from the answer as "*impertinent*" in every sense of the term. The plea of vagueness of description in the contract, and that defendant had not put his town

plat on record before he got a title from the United States, partake largely of the same quality.

The plea that plaintiffs had not used their influence to bring emigrants and make improvements in the intended addition to the city, and thus add value to the land which the respondent would *not* convey to them, was surely *irrelevant*, if not impertinent; and finally, the sweeping charge in the conclusion of the answer, that the whole transaction was in violation of the treaty with the Indians, and in violation of the laws of the United States, and of the statutes of Kansas, does not indicate whether respondent intends to charge the complainants with fraud, or rely upon his own.

It alleges no facts, and is followed \* by no proof. It is in [ \* 331 ] fact a return to the demurrer to the bill, and as such has been argued in this court.

The question to be decided is, whether there is anything on the face of this contract which shows it to be void by any law of the United States. How the treaty or the laws of Kansas can affect it has not been shown, and need not be further noticed. It was time enough to record the plat of the intended city when the respondents had obtained a title, and so far as it concerned the complainants, they could not be in default till they got a title, and were offering their lots for sale. The enumeration of the lots in the contract was a mode of specifying how the land should be divided, and the plat of the intended town could be referred to for description and certainty just as any other private survey or draft.

The laws of the United States which it is alleged invalidate this contract, are the fourth and fifth sections of the act of congress of 31st of March, 1830, entitled "An act for the *relief of purchasers of public lands*, and for the suppression of fraudulent practices at the public sales of the lands of the United States." These sections are in these words:

"Sec. 4. That if any person or persons shall, before or at the time of the public sale of any lands of the United States, bargain, contract, or agree, or attempt to bargain, contract, or agree, with any other person or persons, that the last-named person or persons shall not bid upon or purchase the land so offered for sale, or any parcel thereof, or shall by intimidation, combination, or unfair management, hinder, prevent, or attempt to hinder or prevent, any person or persons from bidding upon or purchasing any tract or tracts of land so offered for sale, every such offender, his, her, or their aiders and abettors, being thereof duly convicted, shall, for every such offense, be fined not exceeding one thousand dollars, or

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imprisoned not exceeding two years, or both, in the discretion of the court.

"Sec. 5. That if any person or persons shall, before or at the time of the public sale of any of the lands of the United States, enter into any contract, bargain, agreement, or secret understanding with any other person or persons, proposing to purchase [ \* 332 ] such land, or pay or give such purchasers for such \* land a sum of money, or other article of property, over and above the price at which the land may or shall be bid off by such purchasers, every such contract, bargain, agreement, or secret understanding, and every bond, obligation, or writing of any kind whatsoever, founded upon or growing out of the same, shall be utterly null and void. And any person or persons being a party to such contract, bargain, agreement, or secret understanding, who shall or may pay to such purchasers any sum of money or other article of property, as aforesaid, over and above the purchase money of such land, may sue for and recover *such excess* from such purchasers in any court having jurisdiction of the same. And if the *party aggrieved* have no legal evidence of such contract, bargain, agreement, or secret understanding, or of the payment of the excess aforesaid, he may, by bill in equity, compel such purchaser to make discovery thereof; and if in such case the complainant shall ask for relief, the court in which the bill is pending may proceed to final decree between the parties to the same: Provided, every such suit, either in law or equity, shall be commenced within six years next after the sale of said land by the United States."

The fourth section is intended to protect the government and punish all persons who enter into combinations or conspiracies to prevent others from bidding at the sales, either by agreement not to do so, or by intimidation, threats, or violence.

There is nothing to be found on the face of this contract which can be construed as an agreement not to bid, or to hinder, intimidate, or prevent others from doing so.

The fifth section is evidently intended for the protection of those who propose to purchase lands at the public sales from the extortions of those who have formed the combinations made penal by the fourth section. The complainants stand in the character of the "*party aggrieved*" by the fraud, if there be any in the case. If Fackler had made his conveyance according to his contract, and the complainants were *now* seeking to recover back the ten thousand dollars paid to him, this section of the statute might have

been invoked by them, on proof of such a combination, [ \* 333 ] and that Fackler was a party to it, as he \* now acknowl-

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edges. But it is no part of the policy of this section to encourage frauds by releasing the fraudulent party from the obligation of his contract. The allegation of the answer that the contract was in violation of the treaty with the Indians, and of the acts of congress, may be a confession of the respondent's own fraud, but it can give no right to commit another.

The answer filed in this case is by Fackler alone; the record shows the agreement of counsel that the bill be dismissed as to Mills.

The court below were therefore right in decreeing a specific performance of the contract, but erred in that part of the decree which orders a conveyance of the *undivided moiety of the* 140 acres. The contract is for a specified and divided moiety of the land, and an undivided moiety of the ferry privilege, and that portion of the decree which orders a conveyance according to the contract is affirmed with costs, and record remitted, with instructions to the court below to reform their decree in accordance with this opinion.

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THE WASHINGTON, ALEXANDRIA, AND GEORGETOWN STEAM PACKET COMPANY, Plaintiffs in Error, v. FREDERICK E. SICKLES and TRUE-MAN COOK.

24 H. 333.

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RES JUDICATA—GENERAL VERDICT ON SEVERAL COURTS.

1. The docket entries of the courts of Maryland and of the courts of the District of Columbia are to be received as records of those courts in evidence of what those entries purport to establish.
2. In a suit upon a special contract, the record of a former suit and judgment between the same parties, in which plaintiffs counted on this special contract, and also on common counts, is admissible as evidence in behalf of plaintiffs, who recovered in the former suit.
3. But such verdict and judgment are not conclusive on defendants as to the special contract, because the jury may have found their verdict on the common counts of that declaration.
4. The action of the court in rendering a judgment on that verdict on the special count does not make that judgment and verdict conclusive in the second suit.
5. Therefore defendants should have been permitted to give evidence, as they offered to do, of what was in issue before the jury, and tried by them in the former suit.

WRIT of error to the circuit court for the District of Columbia.  
The case is fully stated in the opinion.

*Mr. Badger* and *Mr. Carlisle*, for plaintiffs.

*Mr. Bradley* and *Mr. Stone*, for defendants.

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[ \* 340 ] \* Mr. Justice CAMPBELL delivered the opinion of the court.

The defendants in error, as plaintiffs, sued the plaintiffs in error, in assumpsit in the circuit court, upon a special parol contract, purporting to have been made in 1844, to the effect that they having a patent for Sickles's cut-off, for saving fuel in the working of steam-engines, and the defendants being the owners of a certain steamboat, it was agreed between them that the said patentees should attach to the engine of the defendants one of their machines; and that the defendants should pay for the use thereof three-fourths of the saving of fuel produced thereby, the payments to be made from time to time, when demanded. That, to ascertain the saving of fuel, an experiment should be made in the manner described in the declaration, and that the result should be taken as the rate of saving during the continuance of the contract, which was to be as long as the patent and the steamboat should last. The plaintiffs aver, that the experiment had been made, and the rate of saving had been duly ascertained; and that the machine had been used in connection with the engine on the said boat, until the commencement of the suit.

In the first count of the declaration, the plaintiffs further stated, that they brought, in March, 1846, a suit on this contract in the circuit court for the sum then due, and had obtained a verdict and judgment therefor in the circuit court in 1856, and had thus established conclusively the contract between the parties. These last allegations are not contained in the second count. The defendants pleaded the general issue.

The plaintiffs produced upon the trial, as the only testimony of the contract, the proceedings of the suit mentioned in the declaration, and insisted that these proceedings operated as an estoppel upon the defendants. These proceedings consisted of a writ, a declaration, containing two counts upon the contract, and the common counts, and the plea of the general issue; also a docket entry of a general verdict, in favor of the plaintiffs, on the entire declaration, and a docket entry of judgment, subsequently rendered on the first count—a count similar to the counts in the declaration in the present suit.

The defendants objected to these docket entries as [ \* 341 ] evidence of a verdict and judgment; but insisted they were simply memoranda or minutes, from which a record of a verdict and judgment were to be made. It appears that in the courts of this district, as in Maryland, the docket stands in the place of, or, perhaps, is the record, and receives here all the consideration that is yielded to the formal record in other States. These memorials of their proceedings must be intelligible to the court that preserves



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them, as their only evidence, and we cannot, therefore, refuse to them faith and credit. *Bateler v. State*, 8 G. and J. 381; *Rugles v. Alexander*, 2 Rawle, 232. Besides this testimony of the contract, the plaintiffs proved the quantity of the fuel that had been used in the running of the boat, and relied upon the rate as settled to determine their demand, and insisted that the defendants were estopped to prove there was no such contract; or to disprove any one of the averments in the first count of the declaration in the former suit; or to show that no saving of the wood had been effected; or to show that the so-called experiment was not made pursuant to the contract, or was fraudulently made, and was not a true and genuine exponent of the capacity of the said cut-off; or to prove that the said verdict was in fact rendered upon all the testimony and allegations that were submitted to the jury, and was in point of fact rendered, as by the docket entry it purports to have been, upon the issues generally, and not upon the first count specially.

The circuit court adopted these conclusions of the plaintiffs, and excluded the testimony offered by the defendants, to prove those facts.

The authority of the *res judicata*, with the limitations under which it is admitted, is derived by us from the Roman law and the canonists. Whether a judgment is to have authority as such in another proceeding, depends, *an idem corpus sit; quantitas eadem, idemjuss; et an eadem causa petendi et eadem conditio personarum; quæ nisi omnia concurrent alia res est*; or, as stated by another jurist, *exceptionem rei judicatæ, obstare quotiens eadem qæstio inter easdem personas revocatur*. The essential conditions under which the exception of the *res judicata* becomes applicable are the identity of the thing demanded, the identity of \*the cause [ \* 342 ] of the demand, and of the parties in the character in which they are litigants. This court described the rule in *Apsden v. Nixon*, (4 How. S. C. R. 467,) in such cases to be, that a judgment or decree set up as a bar by plea, or relied on as evidence by way of estoppel, must have been made by a court of competent jurisdiction upon the same subject-matter, between the same parties for the same purpose. The thing demanded in the present suit is a sum of money, being a part of the consideration or price for the use of a valuable machine for which the plaintiffs had a patent, and is the complement of a whole, of which the sum demanded in the first count of the declaration in the former suit is the other part. The special counts in the declaration of each suit are similar, being framed upon this contract; and a decision in the one suit on those

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counts in favor of the plaintiffs necessarily included and virtually determined its sufficiency to sustain the title of the plaintiffs on it.

• It was, therefore, admissible as testimony. This conclusion is supported by adjudged cases and the authority of writers on the law of evidence. *Gardener v. Buckbe*, 3 Cow., 120; *Dutton v. Woodman*, 9 Cushing R. 256; *Bonnier des Preuves*, sec. 766; 8 Dalloz, Jur. Generale, 256, 257, 258. Buller, in his work on *Nisi Prius*, says: "If a verdict be had on the same point, and between the same parties, it may be given in evidence, though the trial were not had for the same lands, for the verdict in such a case is very persuading evidence, because what twelve men have already thought of the fact may be supposed fit to direct the determination of the jury. \* \* \* It is not necessary that the verdict should be in relation to the same land; for the verdict is only set up to prove the point in question, and every matter is evidence that amounts to a proof of the point in question." B. N. P., 232. The plaintiffs in error contend that, conceding the record to be admissible as evidence, to render the verdict and judgment in the first suit an estoppel, it must be shown by the *record*, that the very point which it is sought to estop the party from contesting was distinctly presented by an issue, and expressly found by the jury, and that no estoppel by verdict and judgment can arise in an action [ \* 343 ] on the case, or an \* action of assumpsit, tried upon the general issue, because in no such action can any precise point be made and presented for trial by a jury, and the cases of *Outram v. Morewood*, 3 East. 346, *Vooght v. Winch*, 2 B. and Ald. 662, are cited in support of this proposition. And the conclusion would seem to be proper for the attainment of the end, for which authority was allowed to the *res judicata* as testimony. Experience has disclosed, that for the security of rights, and the preservation of the repose of society, a limit must be imposed upon the faculties for litigation. For this purpose, the presumption has been adopted, that the thing adjudged by a court of competent jurisdiction, under definite conditions, shall be received in evidence as irrefragable truth.

This presumption is a guarantee of the future efficacy and binding operation of the judgment. It presupposes that all the constituents of the judgment shall be preserved by the court, which renders it in an authentic and unmistakable form. In the courts upon the continent of Europe, and in the courts of chancery and admiralty in the United States and Great Britain, where the function of adjudication is performed entire by a tribunal composed of one or more judges, this has been done without much difficulty.

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The separate functions of the judge and jury, in common-law courts, created a necessity for separating issues of law from issues of fact; and with the increase of commerce and civilization, transactions have become more complicated and numerous, and law and fact have become more closely interwoven, so as to render their separation more embarrassing. The ancient system of pleading, which was conducive to the end of ascertaining the material issue between the parties, and the preservation in a permanent form of the evidence of the adjudication, has been condemned as requiring unnecessary precision, and subjecting parties to over-technical rules, prolixity, and expense. A system of general pleading has been extensively adopted in this country, which rendered the application of the principle contended for by the plaintiffs impracticable, unless we were prepared to restrict within narrow bounds the authority of the *res judicata*. It was consequently decided that it was not necessary \*as between parties and privies that the [\* 344] record should show that the question upon which the right of the plaintiff to recover, or the validity of the defense, depended for it to operate conclusively; but only that the same matter in controversy might have been litigated, and that extrinsic evidence would be admitted to prove that the particular question was material, and was in fact contested, and that it was referred to the decision of the jury.

In *Young v. Black*, 7 Cr. 565, this court admitted in evidence a record of a former suit between the parties, in which judgment was rendered for the defendant, supported by parol proof that the cause of action in the two suits was the same. The court say: "The controversy had passed in *rem judicatam*; and the identity of the causes of action being once established, the law would not suffer them again to be drawn into question." The current of American authority runs in the same direction. *Wood v. Jackson*, 8 Wend. 9; *Eastman v. Cooper*, 15 Pick. 276; *Marsh v. Pico*, 4 Rawle, 288; *Green Ev.*, section 531.

In the case before the court, the verdict was rendered upon two special counts, and the general counts in *assumpsit*, but the verdict in the subsequent stage of the proceedings was applied by the court only to the first count. The record produced by the plaintiffs showed that the first suit was brought apparently upon the same contract as the second, and that the existence and validity of that contract might have been litigated. But the verdict might have been rendered upon the entire declaration, and without special reference to the first count. It was competent to the defendants to show the state of facts that existed at the trial, with a view to

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ascertain what was the matter decided upon by the verdict of the jury. It may have been that there was no contest in reference to the fairness of the experiment, or to its sufficiency to ascertain the premium to be paid for the use of the machine at the first trial, or it may have been that the plaintiffs abandoned their special counts and recovered their verdict upon the general counts. The judgment rendered in that suit, while it remains in force, and for the purpose of maintaining its validity, is conclusive of all [ \* 345 ] the \* facts properly pleaded by the plaintiffs. But when it is presented as testimony in another suit, the inquiry is competent whether the same issue has been tried and settled by it. *Merriam v. Whittemore*, 5 Gray, 316; *Hughes v. Alexander*, 5 Duer R. 488. The defendants in error contend the jury, by their verdict, necessarily found the statements of fact in all the counts of the declaration to be true; and the effect of a verdict and judgment on the whole declaration and a verdict and judgment on the first count is precisely the same, in producing an estoppel, as respects the matters contained in that special count. But this is not true. If the verdict had been rendered on the special count in exclusion of the others, the record itself would have shown that the existence and validity of the contract were in question. There would have been no ground for the inquiry whether any other issue was presented to the jury. But where a number of issues are presented, the finding on any one of which will warrant the verdict and judgment, it is competent to show that the finding was upon one rather than on another of these different issues. *Henderson v. Kenner*, 1 Rich. R. 474; *Sawyer v. Woodbury*, 7 Gray, 499. Nor do we think that the subsequent application of the verdict to a single count by the court precludes this inquiry. The authority of the courts to make the application, and the circumstances under which it is allowable, was considered by this court in *Matheson v. Grant*, 2 How. 263. It is done for the purpose of preventing the consequences of a mis-joinder of counts in a declaration, or of the union of insufficient counts with others, so as to allow a valid judgment on the verdict. It had no reference to the use that might be made of the proceedings as testimony in another proceeding. In Maryland, the power to amend the record in this form was conferred by the act of 1809. 3 Maxey, Laws, 484. The case is not embraced in the earlier act of 1785 upon this subject. 3 H. and J. 9; *Ibid*, 91. It is the opinion of the court, that the circuit court erred in holding that the plaintiffs in error were estopped by the proceedings in the former suit, for any inquiry in respect to the matters in [ \* 346 ] issue, and actually tried in that cause; and \* its judg-

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ment is reversed, and the cause is remanded for further proceedings, in conformity with this opinion.

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THE UNITED STATES, Appellants, v. JOSE CASTRO and others.

24 H. 346.

CALIFORNIA LAND GRANTS—ABSENCE OF ARCHIVE EVIDENCE.

1. A grant of Pico, purporting to be dated in April, 1846, never presented for record until 1849, no possession prior to that time, no evidence but the paper when it was signed, no petition or informe, is insufficient to justify its confirmation.
2. In the absence of record or archive evidence of a grant, there should be secondary proof that—1. At some former time the grant was regularly made and recorded in the proper office. 2. That the papers in that office, or some of them, had been lost or destroyed. 3. That within a reasonable time after the date of the grant there was judicial possession and acts of proprietorship by claimant.

APPEAL from the district court for the northern district of California. The case is well stated in the opinion.

*Mr. Stanton*, attorney general, for the United States.

*Mr. Edward Swann*, for appellees.

Mr. Chief Justice TANEY delivered the opinion of the court.

The appellees claim title to eleven leagues of land in California under a Mexican grant.

In March, 1853, they filed a petition before the board of land commissioners, stating that the land in question was, on the 4th of April, 1846, granted by Pio Pico, then governor of California, to Jose Castro, one of the appellees, under whom the others claim as purchasers. The petition states that the land was occupied and improved by the grantee soon after the date of the grant.

\*It appears that the paper purporting to be the original [ \* 347 ] grant was deposited in the government archives of the United States, on the 8th of June, 1849, more than three years after its date, and two years after the cession of the territory. It was deposited not by Castro, but by Bernard McKenzie, whose representatives claim a portion of the land under a conveyance from Castro; and the deed to him bears date on the same day—that is, June 8, 1849. The following is the translation of the grant as it appears in the record :

*Pio Pico, Constitutional Governor of the Department of the Californias.*

[SEAL.]

Whereas the lieutenant colonel of cavalry, Don Jose Castro.

Mexican citizen, has petitioned, for the benefit of himself and his family, for a tract of land, for pasturing cattle, on the bank of the river San Joaquin, consisting of eleven leagues, whose measurement is to be commenced from the edge of the Snowy mountains, following down stream—having previously made the necessary investigations, I have, by a decree of this day, granted to the said señor the eleven sitios he prays for, declaring to him the ownership thereof by these present letters, in conformity with the law of August 18, 1824, and the regulations of 21st November, 1828, in conformity with the powers with which I find myself invested by the supreme government, in the name of the Mexican nation, under reservation of the approval of the departmental assembly, and under the following conditions:

1st. He may fence it, without injury to the cross-roads, highways, and rights of way. He may enjoy it freely and exclusively, directing it to the best cultivation or use which may be to his convenience.

2d. He shall request the judge of that district to give him the juridical possession, by virtue of these patents, who shall mark out the boundaries with the respective landmarks, placing, in addition to them, some fruit trees, or others of known utility.

3d. The land, of which donation is made, consists expressly [ \* 348 ] of eleven (sitios) ranges of large cattle, upon the banks of the San Joaquin. Measurement shall commence from the edge of the Sierra Nevada. The judge who may give the possession shall have it measured with entire observance of the ordinances, and in view of the sketch or topographical plan which the grantee shall present.

In consequence whereof, I order that the present title, being held as firm and valid, be recorded in the corresponding book, and delivered to the party in interest for his protection, and other purposes.

Given in the governor's house, at the city of Los Angeles, upon common paper, there being none stamped, on the fourth day of the month of April, one thousand eight hundred and forty-six.

Pio Pico.

JOSE MATIAS MORENO,

*Sec'y pro tem.*

Record has been taken of this superior patent in the respective book.

MORENO.

The handwriting of Pio Pico and Jose Matias Moreno were proved by a single witness. But no testimony was offered to show

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when or where this paper was executed, nor any testimony to show who had the custody of it, until it was deposited in the public archives, as above mentioned; nor is any reason given for keeping it out of the public office for so long a time, nor how McKenzie obtained possession of it, except by the deed from Castro, which he produced at the same time. And nothing was then produced to support the grant but this paper; no petition from Castro, no informe, or decree, as required by the laws of Mexico. And, notwithstanding Moreno's certificate that a record had been taken of it in the respective book, no trace of anything in relation to it is to be found in the archives of the Mexican authorities; nor was any attempt made to take possession until 1849; for although the appellees state in their petition that Castro took possession soon after the grant was made—that is, in 1846—and some of his witnesses swear to the same fact, and some even carry back his possession to 1844, under a promise of Micheltorena \*to [\* 349] make him a grant in that place; yet all of this testimony is contradicted by Vinsenhaller, who appears to have been an active agent in this matter, and directed the surveyor who made the survey in 1853, where he should begin, and where he should run the lines. He says that he was at the place in October, 1849; that Castro took possession in August or September of that year, and built a corral, and had cattle there in the early part of 1850; and that it would have been unsafe, in consequence of the hostility of wild Indians, to have attempted to occupy it earlier. A paper thus wanting in all the written proceedings which the Mexican law required before a grant could be issued, which had never been seen by any one of the witnesses until produced by McKenzie, with no evidence of the time or place of its execution, with no trace of it in the Mexican archives, and the witnesses produced to prove the possession contradicting each other, can hardly be entitled to confirmation as a valid grant. And even if the witness who proves the handwriting of Pio Pico and of Moreno is entitled to belief, yet the conclusion would seem to be irresistible that the paper was fraudulently antedated.

But apart from these circumstances the grant is invalid, and not supported by legal proof, even if all the testimony adduced by the claimants was credible, and the witnesses above suspicion.

The grants of portions of the public domain in Mexico, the mode of obtaining them, and the officers by whom they were to be issued, and the conditions to be annexed to them, were with great precision regulated by law. This law has so often been referred to and commented on in former opinions of this court, that it is un-

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necessary to report here its particular provisions. It is sufficient to say that it was required to be in writing, the officers and tribunals before which it was to pass designated, and every step in the process, from the petition of the party to the final consummation of the title, was not only required to be in writing, but also to be deposited and recorded in the proper public office among the public archives of the republic.

Whenever, therefore, a party claims title to lands in [ \* 350 ] California \* under a Mexican grant, the general rule is that the grant must be found in the proper office among the public archives; this is the highest and best evidence.

But as the loss or destruction of public documents may in some instances have occurred, it would be unjust that a party should be deprived of his property by reason of an accident which he had not the power to prevent; and upon proof of that fact, secondary evidence to a certain extent will be received.

But in order to maintain a title by secondary evidence, the claimant must show to the satisfaction of the court: 1st, that the grant was obtained and made in the manner the law required, at some former time, and recorded in the proper public office; 2d, that the papers in that office, or some of them, have been lost or destroyed; and, 3dly, he must support this proof by showing, that within a reasonable time after the grant was made, there was a judicial survey of the land, and actual possession by him, by acts of ownership exercised over it.

The survey and possession are open and public acts, and would support the parol evidence of its former existence and destruction or loss. It would show the knowledge of the officers of the government of the title claimed, and their acquiescence in the justice and legality of the claim.

But without a survey and possession the authenticity of the grant would have nothing to support it but parol testimony, resting only in the knowledge of individual witnesses; for if what purports to be a grant is produced by the party from some private receptacle, and the handwriting of the official signatures proved by witnesses, and even proved to have been executed when it bears date, it is but parol testimony, open to doubt, since its authenticity depends upon the truth or falsehood of the witnesses, instead of resting upon the certainty of the public records of the nation.

We find nothing in the history of Mexican jurisprudence or Mexican grants which would justify this court in supporting a Mexican title made out by such testimony only, or by secondary evidence of any kind short of that above stated.



It will be found, upon referring to the various cases which \* have come before us from California, that none [ \* 351 ] have been confirmed, unless the grant was established according to the rules of evidence above stated. And they are recognized in the cases of the United States v. Fuertes, 22 How. 445; U. S. v. Batton, 23 How. 341; U. S. v. Luco, 23 How. 615; and U. S. v. Palmer, Cook, & Co., decided at the present term. We repeat again these rules of evidence, because it would seem from the case before us that the board of land commissioners and the circuit court regard written documentary evidence, produced by a claimant from a private receptacle, and proved by oral testimony, as of equal authenticity and entitled to equal respect with the public and recorded documents found in the public archives. But such a rule of evidence is altogether inadmissible. It would make the title to lands depend upon oral testimony, and consequently render them insecure and unstable, and expose the public to constant imposition and fraud. Independently, therefore, of the strong presumptions against the authenticity of the paper produced as a grant, it cannot upon principles of law be maintained, even if the testimony produced by the claimant was worthy of belief.

The case of *Fremont v. The United States* is referred to, both in the opinion of the board of land commissioners and the circuit court, and relied on to support their respective opinions. But that case has no analogy to this. There the title-papers, from the petition down to the grant, were found in regular form in the Mexican archives. Their authenticity was therefore attested by the record; and the reasons for the delay in making the survey and taking possession were made known at the time to the governor, and approved and allowed by him. All of this appeared in the regular official documents; and the difficulty that arose in his case arose upon the conditions annexed by law to an undoubted and admitted grant. Here the difficulty is, whether there is legal evidence to prove that this alleged grant was ever made by the Mexican authorities. And the fact that it was so made must be established by competent evidence, before any of the questions which arose and were decided in *Fremont's* case can arise in this.

\*The authenticity of the grant must first be estab- [ \* 352 ] lished before any question can arise upon the conditions annexed by law to such grants, or concerning the certainty or uncertainty of the boundaries specified in it. And in the case before us, the grant itself not being maintained by competent testimony, we need not inquire whether the conditions were complied

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with, or the description of place and boundaries sufficiently certain.

And for the reasons above stated the judgment of the circuit court must be reversed, and the case remanded to the district court, with directions to dismiss the petition.

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GEORGE W. DAY and others, Plaintiffs in Error, v. W. A. WASHBURN and others.

24 H. 352.

EQUITY PRACTICE.

1. Where two creditors, by simple contract, file a bill against their debtor and his assignee, to set aside the assignment as fraudulent, and other creditors come in and are afterwards made co-complainants, those first filing the bill obtain no priority over the others in the distribution of the property subject to the bill by decree.
2. In the absence of a lien by judgment or otherwise the rule of equity in such case is equality.

APPEAL from the circuit court for the district of Indiana. The case is stated in the opinion.

*Mr. Henderson*, for appellants.

*Mr. McDonald* and *Mr. Porter*, for appellees.

[ \* 354 ] \*Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the circuit court of the United States for the district of Indiana.

The bill was filed in the court below by two mercantile firms, creditors of Washburn, against him, and the assignee of his property, for the purpose of setting aside the assignment as fraudulent against creditors, and that the property might be applied in satisfaction of the complainants' demands. These demands were simple contract debts, not reduced to judgment.

The defendants demurred to the bill, and assigned, as the ground of the demurrer, the want of equity.

The court overruled the demurrer, and the defendants answered separately, among other things denying all fraud in the assignment. Replications were filed to the answers.

In this stage of the case, the other creditors of Washburn applied by petition to the court to be made parties to the [ \* 355 ] bill, \*charging fraud in the assignment, and praying that it might be set aside, and the property and effects of the debtor be subjected to the payment of all his debts, and be divided equally among all the creditors.

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The court ordered that these petitioning creditors become co-complainants, and referred the case to a master to take an account of what was due to each of the complainants, which account was duly taken, and a report made to the court; and afterwards the defendant, Keith, was ordered to bring into court the amount of moneys admitted by him to be in his hands, made out of the assigned property, amounting to the sum of \$2,437; and then, at a subsequent day in the term, the court overruled a motion made, on behalf of the two firms who filed the bill, to have the moneys in court applied to the payment of their debts in preference to the other creditors; and adjudged the assignment fraudulent as to creditors, and directed that the whole fund be distributed ratably among all of them, according to their respective demands, and referred the case to a master to make the distribution; and on his report, confirmed the same.

The case is before us on appeal by the two firms who filed the bill, alleging for error the refusal of the court to give them preference in the distribution of the assets.

The proceedings in the case have not been conducted with much regularity, but the principles of equity governing the rights of the parties concerned are very well settled, and the application of them to the facts as presented will satisfactorily dispose of it.

The court of chancery does not give any specific lien to a creditor at large, against his debtor, further than he has acquired at law; for, as he did not trust the debtor on the faith of such lien, it would be unjust to give him a preference over other creditors, and thus defeat a *pro rata* distribution, which equity favors, unless prevented by the rules of law. It is only when he has obtained a judgment and execution in seeking to subject the property of his debtor in the hands of third persons, or to reach property not accessible to an execution, that a legal preference is acquired, which a court of chancery will enforce. (2 John. Ch. 283; 4 Ib. 691.)

The two firms, therefore, who filed the bill, the appellants here not having reduced their demands to judgment and execution before seeking relief against the fraudulent assignment of the debtor, are not in a situation to set up any claim to a preference over the other co-complainants, or to object to an equitable distribution of the assets among all the creditors.

Indeed, the principle upon which the bill seems to have been drawn, and is now sought to be sustained, would preclude any preference in favor of the appellants—which is, that the debtor's property, in the hands of the assignee, constituted a fund for the

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benefit of creditors, which a court of equity only could reach, and hence that the creditor had a right to the interposition of the court, without first obtaining a judgment and execution. It is true, where a specific fund has been assigned or pledged for the benefit of creditors, and it is necessary to go into a court of chancery to make a distribution among them, the equitable lien of each creditor upon the fund lays a sufficient foundation for the interposition of the court. It will enforce this equitable lien thus arising out of the assignment or pledge for the benefit of the creditors, in the exercise of its own appropriate jurisdiction. But in all these cases, chancery, upon its own principles, distributes the fund *pro rata* among all the creditors, unless preference is given in the pledge or assignment of the fund. In the present case, as the assignment was made to Keith, in trust of the benefit of creditors, if the bill had been filed to enforce the trust, no judgment or execution would have been necessary, as preliminary steps to the interposition of the court; but in that case the appellants would not have been entitled to a preference, as none was given to them in the trust deed, but the contrary.

For this reason, doubtless, the bill was filed to set aside the deed as fraudulent, with a view to defeat the preferences given therein to other creditors. The objection that the demands of the appellants had not been reduced to judgment and execution before filing the bill, would have been fatal to the relief sought, [ \* 357 ] if taken in time by the defendants. It was waived, \* however, both as respected the appellants and the other complainants; and, as the court was left unembarrassed by the objection, it was right in proceeding to dispose of the property and effects of the debtor, and to make the proper application of them; and, as we have seen, neither of the creditors had acquired a preference at law, the application in chancery, upon its own principles, was a ratable distribution among all the creditors as decreed by the court below.

Decree affirmed.

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CHARLES TATE and others, Plaintiffs in Error, v. JOHN G. CARNEY and others.

24 H. 357.

POWER OF REGISTER AND RECEIVER OF LAND OFFICE.

1. The decisions of the register and receiver of the land office, under the act of May 8, 1822, concerning lands west of the Perdido river, are not conclusive of the facts on which they act.

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2. Such receivers have no right to reconsider and annul certificates granted by their predecessors many years before, under which the land has been held in possession and *bona fide* titles acquired.
3. A certificate and patent, on such second decision, which reserves the rights of the claimant under the first certificate, leaves open the question of right in the matter under the two claims.

WRIT of error to the supreme court of Louisiana. The case is stated in the opinion.

*Mr. Benjamin*, for plaintiffs.

*Mr. Taylor*, for defendants.

\* Mr. Justice CAMPBELL delivered the opinion of the court. [\* 358]

This cause comes before this court by a writ of error to the supreme court of the State of Louisiana, under the 25th section of the judiciary act of September, 1789. The defendant in error (Carney) commenced a suit in the district court of the 8th judicial district of Louisiana, in which he asserted that he had purchased, in the year 1844, at the probate sale of the succession of Sarah Cohern, deceased, five hundred and sixty acres of land on Cool creek, in that district, and that Charles Tate had disturbed his possession and denied his title. He summoned Charles Tate to exhibit his claim to the land, and required the representatives of Sarah Cohern, deceased, to maintain the title they had warranted to him, or to refund the purchase money he had paid. The result of various proceedings in the district court was the forming of an issue between the defendant in error and the plaintiffs in error relative to their respective rights in the said parcel of land. It is situated in the section of country east of the Mississippi river and the island of New Orleans, and west of the Perdido river, which was claimed by the United States under the treaty of Paris of 1803, for the cession of Louisiana, and which was adversely claimed and possessed by Spain as a portion of West Florida until 1812-13. The act of congress for ascertaining the titles and claims to lands in that part of Louisiana which lies east of the Mississippi river and island of New Orleans, approved 25th April, 1812, is the first of the series of acts that apply to this district. 2 Stats. at Large, 713. The 8th section requires the commissioners to be appointed under the act to collect and report to congress, at their next session, a list of all the actual settlers on land in said districts, respectively, who have no \* claims to land derived either from the French, [\* 359] British, or Spanish governments, and the time at which such settlements were made. The reports made by the commissioners appointed under the act of 1812 were submitted to congress, and

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are the subject of the act of the 3d March, 1819, for adjusting the claims to land, and establishing land offices in the district east of the island of New Orleans. 3 Stats. at Large, 528.

The third section of this act provides, "that every person whose claim is comprised in the lists or register of claims reported by the said commissioners, and the persons embraced in the list of actual settlers not having any written evidence of claim reported as aforesaid, shall, when it appears by the said reports or by the said lists that the land claimed or settled on had been actually inhabited or cultivated by such person or persons in whose right he claims, on or before the fifteenth of April, 1813, be entitled to a grant for the land so claimed or settled on as a donation; provided that not more than one tract shall be thus granted to any one person, and the same shall not contain more than six hundred and forty acres." By the 9th section of this act, the register and receiver of the land offices in that district were authorized to make additions to the list of settlers, noting the time of their settlement, and to report the same to congress. These, with other reports, were disposed of in the supplementary act for adjusting land claims in that district, adopted 8th May, 1822. 3 Stats. at Large, 707. The third section of the act of 1822 is in the same language as the corresponding section in the act of 1819 before cited. The sixth section of this act requires the register and receiver to grant a certificate to every person who shall appear to be entitled to a tract of land under the third section of the act, setting forth the nature of the claim and the quantity allowed. In 1820, Robert Yair made proof in the land office that in the year 1805 he had settled upon a parcel of land in the district, and had occupied and cultivated it from that time until the date of his application and proof. His claim was reported to congress, and in 1824 a certificate issued to him for that land, which is the land in controversy. Robert Yair continued to occupy the land [ \* 360 ] until his death, in 1825 or 1826, when it passed \* to his widow and heirs. The defendant in error (Carney) traces his title to these heirs. The claim of the plaintiffs in error is traced to Nancy Tate, their ancestress, who made a settlement in the same district in 1811, and whose claim was reported under the act of 1812, before cited.

In the year 1847, her heirs applied to the register and receiver of the land office in that district for an order of survey, in which application they represented that Nancy Tate was entitled to a section of land under the acts of congress aforesaid; that she had settled upon public land in an adjoining section, forty-one; that John Tate was settled upon the same section; and that both could

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not have their complement of land, from their proximity, out of land contiguous to their settlement. But that there was vacant land to the east and northeast, not claimed by any person, sufficient to make up the quantity she had been entitled to, and prayed for the order, as one that could not injure any other person. The register and receiver caused a notice to be served on the defendant in error, to show cause why the order should not be granted. There is no evidence that he appeared on this notice.

In February, 1848, the register and receiver made a decision, in which they declared that Nancy Tate had settled upon this land; that they were satisfied that Robert Yair, at the time of the confirmation to him, was the holder of another donation for one thousand arpents, and that he was not entitled to this under the act of 1822, for that reason. They annulled the certificate that had been issued to him, and granted the order of survey as applied for. The survey was made to include this land, and a patent was issued in favor of the representatives of Nancy Tate in 1853. This patent describes the land as covered by the claim of Robert Yair, and releases the land, subject to any valid right, if such exists, in virtue of the confirmed claim of Robert Yair, or of any other person claiming from the United States, the French, British, or Spanish governments. The supreme court of Louisiana have found from the testimony that Nancy Tate was not an occupant of this land, and that the settlement of Robert Yair and his representatives had been continuous for some forty years. The \*question [ \* 361 ] for the consideration of this court is, whether the decision of the register and receiver of the land office in favor of the plaintiffs in error is conclusive of the controversy. The supreme court decided that it was not, and we concur in that opinion.

In *Doe v. Eslava*, 9 How. 421, the defendant in error relied upon a decision of the register and receiver of a land office in the same district, with the same powers as were confirmed upon these, as conclusive in his favor. This court answered: "We do not consider that the act of May 8th, 1822, and that of the same date, which is connected with it, and referred to as *in pari materia*, for a guide, meant to confer the adjudication of titles of land on registers and receivers. Sometimes, as in the case of pre-emptioners, they are authorized to decide on the fact of cultivation or not; and here, from the words used, no less than their character, they must be considered as empowered to decide on the true location of grants or confirmations, but not on the legal and often complicated questions of title, involving, also, the whole interests of the parties, and yet allowing no appeal or revision elsewhere. The power given

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to them is, to decide only how the lands confirmed shall be located and surveyed. The further power to decide on conflicting and interfering claims should apply only to the location and survey of such claims, which are the subject-matter of their cognizance; and on resorting to the reference made to the second act of Congress, that act appears also to relate to decisions on intrusions upon possessions and other kindred matters."

The case of *Cousin v. Blanc*, 19 How. 203, involved a question of the effect and binding operation of a decision of the register and receiver of the land office upon a location and survey of a claim confirmed under the act of 1822, and refers to the act of the 3d March, 1831, as showing that the decisions of the register and receiver were not to be considered as precluding a legal investigation and decision by the proper judicial tribunals between the parties to interfering claims. 4 Stats. at Large, 492.

It furnishes no support of the argument that the decision [ \* 362 ] \* of the register and receiver in such a case as this is conclusive of the title. There is no dispute in this case upon the subject of the location of the claim of Yair. The whole case shows that it had been identified and was actually possessed by Yair and his heirs. The patent of the defendants in error acknowledges that its location had been made, and that the new survey for the claim of Mrs. Tate covered this location. The decision of the register and receiver does not proceed upon any assumption of a conflict of location, but of a denial of the right of Yair. They had no authority to overthrow the decision of the register and receiver that had been made more than twenty years before, which had been followed by possession, and as to which there had intervened the claims of *bona fide* purchasers. It further appears that Mrs. Tate did not settle upon this parcel of land, and that the decision of the register and receiver in her favor is not supported by testimony. The judgment of the supreme court of Louisiana does not contain any error within the scope of the revising jurisdiction of this court, and it is consequently affirmed.

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SAMUEL MASSEY and others, Plaintiffs in Error, v. JOSEPH L. PAPIN.

24 H. 362.

CONFIRMATION OF SPANISH GRANT INURES TO BENEFIT OF MORTGAGEE IN MISSOURI.

1. By the laws of Missouri an imperfect title by Spanish concession was the subject of sale and mortgage.
2. When, therefore, congress confirmed such a claim to the mortgager or his represent-



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atives, though it had once been rejected by the commissioners, it inured to the benefit of the purchaser under the mortgage foreclosure, and not to the heirs of the mortgager.

WRIT of error to the supreme court of Missouri. The case is stated in the opinion.

*Mr. Blair*, for plaintiffs in error.

*Mr Glover*, for defendants.

\* Mr. Justice CATRON delivered the opinion of the court. [ \* 363 ]

This case is brought here by writ of error to the supreme court of Missouri.

In 1806, James Mackay presented his claim before the board of commissioners, sitting at St. Louis, to have confirmed to him 30,000 arpents of land. In 1809, the board rejected the claim.

In 1819, Mackay gave a bond in the nature of a mortgage on 14,000 arpents of the land to Delassus. Papin claimed as assignee of the mortgage, which he caused to be foreclosed, and purchased in the land, and took a title from the sheriff. Massey and others claim under Mackay's heirs.

The supreme court of Missouri decided that Papin, claiming under the mortgage of Mackay to Delassus, had a better title than Massey, who claimed under the heirs. And to reverse this decision, this writ of error is prosecuted.

The board of land commissioners of 1809 refused to confirm the claim ; they were acting on the title as between the United

\* States and the claimant. The government had the power [ \* 364 ] to grant the land in fee, regardless of the opinion of the board. Accordingly, in 1832, an act of congress was passed organizing another board to examine this description of Spanish claims, which had been rejected by the old board. The new board, in October, 1832, recommended the claim for confirmation "to said James Mackay, or his legal representatives." James Mackay had died, and his heirs presented the claim the second time ; and it is insisted that the confirmation to them by the act of 1836 rejected the mortgage of Delassus, and that the heirs took the unincumbered legal title discharged of the mortgage.

An imperfect Spanish title, claimed by virtue of a concession, was, by the laws of Missouri, subject to sale and assignment, and of course subject to be mortgaged for a debt. The heirs of Mackay took the lands by descent, with the incumbrance attached, and held them in like manner that their ancestor held. The grant of the lands to the heirs by the act of 1836 carried the equities of the

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mortgagee with the legal title, of which he took the benefit—a consequence contemplated by the mortgage itself; and if the assignment had been in its form a legal conveyance of the lands, the grantee would have taken a legal title. And to this effect are the cases of *Bissel v. Penrose*, 8 How. and *Landes v. Brant*, 10 How.

It is ordered that the judgment be affirmed.

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HENRY AMEY, Plaintiff in Error, v. THE MAYOR, &c., OF ALLEGHENY CITY.

24 H. 364.

MUNICIPAL BONDS.

1. The act of the legislature of Pennsylvania of April 5, 1849, authorizing subscription to the railroad company, uses the words "certificates of loan," which is synonymous with coupon bonds, and the use of the word bonds in the act of 1852 means the same thing.
2. Although, by the act of 1850, the statute had prohibited the city of Allegheny from creating a debt exceeding \$500,000, the subsequent act of 1852, authorizing the council to take \$200,000 additional stock in the railroad company, and issue bonds therefor, is to be held as repealing that limitation *pro tanto*. The fact that the ordinance for this second subscription was not recorded within thirty days after its passage does not invalidate the bonds in the hands of innocent purchasers for value.

THE case comes up on a certificate of division of opinion between the judges of the circuit court for the western district of Pennsylvania. The case is stated in the opinion.

*Mr. Knox*, for plaintiff in error.

*Mr. Loomis*, for defendants.

[ \* 367 ] \* Mr. Justice WAYNE delivered the opinion of the court.

This case has been sent to this court on a certificate of division of opinion between the judges of the circuit court for the western district of Pennsylvania.

The plaintiff has sued the mayor and aldermen and citizens of Allegheny City, in actions of debt, upon several coupons of bonds which were issued by that corporation, and made payable to the Ohio and Pennsylvania Railroad Company, in payment for two subscriptions, of two hundred thousand dollars each, to the stock of the latter.

It was agreed by the parties upon the trial of the cause to submit it for the opinion of the court upon a statement, in the nature

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of a special verdict, and that verdicts upon the coupons should be entered accordingly.

The judges, however, in their consideration of the case, differed in opinion on the following points: "Whether the several acts of assembly recited in the case stated conferred any \* authority on the corporation of the city of Allegheny to [ \* 368 ] issue bonds with coupons, as had been done, or whether the same are altogether null and void, by reason of such want of authority, or for any other irregularity connected with their issue."

It is admitted that the bonds were issued and delivered in payment for subscriptions of stock to the Ohio and Pennsylvania Railroad Company; that they were made payable to that company or its order; that the company had negotiated them to raise funds to construct the road, and that the road had been completed in conformity with the conditions of the subscriptions of the defendants.

The parties agree that the subscriptions had been made by the authority of acts of the legislature of the State of Pennsylvania, in conformity with the charter of the railroad company, and were intended to be in pursuance of resolutions and ordinances of the select and common councils of the city of Allegheny.

The mayor was first instructed to subscribe for four thousand shares of the capital stock of the Ohio and Pennsylvania Railroad Company, to be paid for in bonds, with coupons attached for interest, payable semi-annually, the bonds having twenty-five years to run. The railroad agreed to pay the interest upon the bonds until the completion of the road, or so much of it as may be adequate to pay the interest, and that the proceeds of the bonds were to be applied to the construction of the road from the city of Allegheny to the mouth of the Big Beaver river, about twenty-five miles. And to secure the city and the bondholders, it was stipulated, in addition to the legal obligations incurred in making the subscriptions, that the stock, with the interest, earnings, and dividends of the road, should be pledged to pay the interest, and finally to redeem the bonds. Accordingly two hundred bonds of \$1,000 were prepared, and were delivered to the railroad company, on the 1st of January, 1850, and the city at the same time received a certificate of four thousand shares. The coupons now sued upon were a part of those which were attached to those bonds.

\* The second subscription was made in virtue of another [ \* 369 ] act of the assembly of Pennsylvania, and in compliance with a resolution of the city, dated June 19th, 1852. That act authorized the city to increase its subscription to the capital stock of the railroad company, to any amount not exceeding its first sub-

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scription, upon the laws and conditions which had been prescribed for the first; but it restrained the city from making an issue of bonds of a less denomination than \$100. The act also exempts the stock from the payment of any tax in consequence of the payment of any interest to stockholders, until the net earnings of the company shall realize six per cent. per annum on the capital stock. The city authorities passed an ordinance for this additional subscription, but it was not published in compliance with the charter of the city, nor was it recorded in the manner which it is said the charter requires the city ordinances to be. For those neglects, it is said the ordinance was null and void, and that the city had not the power to make the second subscription under the act of the legislature. But the city bonds were issued, and the subscription was made. It is also objected that the ordinance was endorsed upon the bonds, without any proviso requiring the railroad company to pay the interest upon them according to its stipulation. But it is admitted that the road was built first from the city to the Big Beaver river, and afterwards completed to its termination on the western border of Ohio, and thence to Chicago.

The city continues to hold its stock in the railroad company. It has received five dividends from the company—one of \$14,000, another of \$16,000, another of \$12,000—which were retained by the company by the consent of the city, and had been appropriated to the payment of the coupons for interest; and that \$4,000 of those dividends had been paid in cash, and others in stock. Prior to the city's second subscription, it appears that the debt of the city had become \$500,000, the limit prescribed by an act of the legislature. That act is, "that it should not be lawful for the councils of the city, either directly or indirectly, by bonds or certificates of loan of indebtedness, or by virtue of any contract, [\* 370] or by any means or device whatsoever, \* to increase its indebtedness to a sum which, added to the existing debt, shall exceed \$500,000, exclusive of the subscription of \$200,000 to the Ohio and Pennsylvania Railroad Company."

It is admitted, also, that the stock of the city in the railroad company had been voted at all elections of it by order of the city, except in a single instance, when the city refused to vote. The city was incorporated on the 11th April, 1840, with all the powers and authorities then vested by law in the select and common councils of the city of Philadelphia.

We have given the agreed case of the parties in every particular in any way bearing upon the points about which the judges in the court below were divided in opinion, and will now consider them.

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The subscriptions of the defendants were made under the acts of the 5th April, 1849, and that of the 14th April, 1852. The first permitted a subscription of \$200,000, to be paid for by "certificates of loan." The second permitted the increase of it, to an amount not exceeding the first, without, however, having altered the manner in which the corporate credit of the city was to be used for the payment of the second subscription. We infer from the words of the act, and do not see how it can be otherwise, that it was to be paid for by the *same certificates of indebtedness* which the legislature had directed to be issued and used for the payment of the first subscription. The act is, "that the city of Allegheny is hereby authorized to increase its subscription to the capital stock of the said Ohio and Pennsylvania Railroad Company to any amount not exceeding the subscription heretofore made by the said city, upon the terms and conditions prescribed in regard to said previous subscription; provided no bond for the payment of the subscription shall be issued of a less denomination than one hundred dollars." This proviso is merely an inhibition upon the city to use for the payment of the subscription any certificate of indebtedness less than \$100; and the words "no bond for the payment of the subscription shall be issued," when considered in connection with the act authorizing the second subscription, that it should be made "upon the same terms and conditions \* of the first," [ \* 371 ] cannot be interpreted into a permission or direction of the legislature, that the city might use in payment for the stock any other legal or commercial instrument than "*certificates of loan.*" Such certificates are well and distinctly known and recognized in the usages and business of lending and borrowing money, in the transactions of commerce, also, and for raising money upon the contract in them for industrial enterprises and internal improvements. They were formerly more generally known than otherwise as "certificates of loan," with certificates for interest attached, payable to the bearer at particular times within the year, at some particular place, being a part of the contract, from which they must be cut off to be presented for payment. But now, in their use, they are called bonds, with coupons for interest—a coupon bond—*coupon* being the interest payable separable from the certificate of loan, for the purpose of receiving it. But neither the instrument nor coupon has any of the legal characteristics of a bond, either with or without a penalty, though both are written acknowledgments for the payment of a debt.

Such certificates of loan have been resorted to for many years in the United States to raise money for internal improvements. They

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were as well known and used in Pennsylvania as elsewhere, and were permitted to be issued in that State, by just such enactments as those which authorized the city of Allegheny to subscribe to the capital stock of the Ohio and Pennsylvania Railroad Company. Such an issue was applicable to the subject-matter of legislation. The city solicited the State to be allowed to make the subscriptions. It was the policy of the State to grant the application. The subscriptions were made under the act of the 5th April, 1849, and that of the 14th April, 1852. The first permits a subscription of \$200,000, which was to be paid for by certificates of loan. The act of the 14th April, 1852, allowed the increase of the subscription to an amount not exceeding the first, upon the same terms and conditions. It was the understanding of the legislature, of the city, and of the railroad company, that the subscriptions were to be paid for by the corporate credit of the city by the issue of "certificates of loan." That appears \* from the act of 1849, authorizing it, before the subscription was in fact made.

The act provides, in anticipation of its being done, that the certificates of loan which shall hereafter be issued by the city of Allegheny in payment of any subscription to the Ohio and Pennsylvania Railroad Company, were to be exempt from all taxation, except for State purposes. The railroad company took from the city certificates of loan in payment of the subscriptions, sold them as such, and with the money built the road. Such a concurrence of contemporaneous action by all the parties interested in the subject-matter of legislation, proves that it was the intention of the legislature that the authority given to the city to make the subscriptions to the railroad company, had been carried out just as it was meant to have been.

We answer, therefore, that the several acts of assembly stated in the agreed case did confer authority on the corporation of the city of Allegheny to issue certificates of loan, otherwise bonds with coupons, as was done, to pay for its first and second subscriptions to the capital stock of the Ohio and Pennsylvania Railroad Company.

We will now inquire whether the bonds or certificates of loan which were issued are null and void "for any irregularity connected with their issue."

It is said there were two irregularities which made them so. The first is, that the debt of the city had reached its limit of \$500,000 prior to the second subscription. The second is, that the city ordinance authorizing the issue for the payment of the subscriptions was null and void, from not having been published in conformity with the charter of the city.

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The first objection depends upon the proper construction of the act of 8th May, 1850, section 4, in connection with the act of the 14th April, 1852, which authorized the second subscription. The first declares that the indebtedness of the city should not be made to exceed five hundred thousand dollars, exclusive of the subscription of two hundred thousand dollars to the railroad company; and it is urged, that the act of 14th April, 1852, though it authorizes the city to make a second subscription of two hundred thousand dollars, does not permit \*the city to increase its [\* 373] debt to a larger sum than seven hundred thousand dollars, to which it was limited by the first act of 1850. The objection has risen from a misconception of the 4th section of the act of 1850. It provides that it shall not be lawful *for the councils of the city of Allegheny*, either directly or indirectly, or by bonds, certificates, or loans, or of indebtedness, or by virtue of any contract, or by any other means or device whatsoever, to increase the indebtedness of the said city, in a sum which, added to the existing debt, shall, taken together, exceed five hundred thousand dollars, exclusive of the subscription of two hundred thousand dollars to the Pennsylvania Railroad Company; meaning, obviously, that no increase of debt should be made by the councils beyond the sum of \$500,000, but not intending that the legislature might not authorize an increase of it beyond that amount, as it had previously done by authorizing the first subscription to the railroad company. The same political power which allowed the first subscription could, at a succeeding session of the legislature, give authority to the city to make a second. Such authority was given by the act of the 14th April, 1852. The city councils could not under its charter have made either the first or second subscription without authority from the legislature, *but by its charter it could contract debts for the purposes of its incorporation to a larger amount than \$500,000*. When, then, the legislature was called upon to authorize the city to make the first subscription, increasing its indebtedness two hundred thousand dollars, beyond what the city might have owed then for other purposes, it was thought prudent, as well for the protection of the citizens of Allegheny as for those who might purchase these certificates of stock with coupons, to declare that the councils of the city should not thereafter, *by virtue of their charter authority to contract debts*, by any device whatever, increase its amount to more than five hundred thousand dollars. And as it has turned out, judging from the attitude of the mayor, aldermen, and citizens of Allegheny in this suit, it must be admitted to have been upon the

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part of the legislature of Pennsylvania a very commendable precautionary act of legislation.

[ \* 374 ] \* Having thus disposed of the first irregularity imputed to the councils of Allegheny, in making their issue for the payment of the second subscription, we proceed to the second.

It is, that the ordinance of the city directing the issue for the payment of the second subscription had not been recorded within thirty days. It is admitted in the stated case that it had not been.

By the 8th section of the charter of the city of Allegheny, it is provided, that in order that a knowledge of the laws, ordinances, regulations, and constitutions of the city, authorized by the seventh section of the charter, may at all times be had and obtained, and the publications thereof at all times be known and ascertained, such and so many of them as shall not be published in one or more of the public newspapers published in the city, or in such other way as the select and common councils may direct, within fifteen days after these laws severally passed, &c., &c., and also recorded in the office for the recording of deeds, &c., &c., &c., within thirty days after these laws passed, &c., &c., shall be null and void.

Now, it does not require a very careful examination of the section to determine that it can have no bearing upon the ordinance directing the issue for the payment of the second subscription of the city to the Ohio and Pennsylvania Railroad Company, for in terms it is only applicable to ordinances, &c., *authorized by the 7th section of the charter*, and that did not permit such a subscription to be made, and paid for by the city stock, as the ordinance for that purpose was intended. It could only be made by the authority of the legislature. In other words, the legislature enlarged the powers of the councils of Allegheny, to do what it could not do by charter. Besides, if the section was not limited to such ordinances, &c., as are *authorized by the 7th section of the charter*, and those words were not in it, it could have no application to an ordinance of the city passed for a special purpose to carry out an act of the legislature, outside of the charter, as was the case here. We have determined that the acts of the legislature have been carried out by the city in the way they should have been done. Neither the or-

[ \* 375 ] dinance, nor the stock issued by \* the city, are deficient in any substantial particular. The latter has every formality of the corporation to give them currency. They were circulated for ten years, and were constantly acknowledged by the city, as its bonds, for the purposes for which they were issued. They are now in the hands of *bona fide* transferees, to whom they must be paid according to their terms. It would be inequitable if the city could



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*Amey v. The Mayor, &c., of Allegheny City.*

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repudiate them at all, and more especially, if that were allowed to be done upon the ground of any fault in the corporation in their issue. But we will not enlarge further upon the case. The points of objection of which we have treated have already been before this court in several cases, and they are worthy of perusal. See the cases of the Commissioners of Knox County, Indiana, *v. Wallace*, 21 Howard, 239; *Zabriskie v. Cleveland, Columbus, and Cincinnati Railroad Company*, 23 Howard, 381.

We have not, in our treatment of this certified division of opinion, discussed that position of the learned counsel who argued it for the defendant, that the acts of the legislature of Pennsylvania, authorizing the issue of the certificates of loan, were unconstitutional.

Agreeing with him in the main, as to the foundations upon which the correctness of legislation should be tested, and the objects for which it ought to be approved, we cannot, with the respect which we have for the judiciary of his State, discuss the imputed unconstitutionality of the acts upon which the subscriptions were made to the Ohio and Pennsylvania Railroad Company; it having been repeatedly decided by the judges of the courts of Pennsylvania, including its supreme court, that acts for the same purposes as those are, which we have been considering, were constitutional.

We shall order it to be certified, that the issue of bonds with coupons, in the case stated, are not null and void, but that it was done under the authority of constitutional acts of the State of Pennsylvania, in the case stated; and further, that they are not null and void for any irregularity connected with that issue by the city of Allegheny.

*Order.*

[ \* 376 ]

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the western district of Pennsylvania, and on the point or question upon which the judges of the said circuit court were opposed in opinion, and which were certified to this court for its opinion, agreeably to the act of congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court that the issue of bonds with coupons, in the case stated, are not null and void, but that it was done under the authority of constitutional acts of the State of Pennsylvania, in the case stated; and further, that they are not null and void for any irregularity connected with that issue by the city of Allegheny. Whereupon it is now here ordered and adjudged that it be so certified to the said circuit court

THE BOARD OF COMMISSIONERS OF KNOX COUNTY, Plaintiffs in Error,  
v. W. H. ASPINWALL and others.

24 H. 376.

MUNICIPAL BONDS—MANDAMUS.

1. By the 14th section of the judiciary act, the circuit courts are authorized to issue such writs, including *mandamus*, as may be necessary to the exercise of their jurisdictions, and agreeably to the common law.
2. Where a judgment is obtained in that court upon bonds and coupons, for which the court authorities are legally bound to levy the necessary taxes to pay them, a writ of *mandamus* is the appropriate remedy to compel the levy of the tax; and such a writ is according to the course of the common law, and necessary to the jurisdiction of the court rendering the judgment.
3. When the commissioners had due notice, and made defense, the order for the peremptory writ is not erroneous, because no alternative writ had been previously issued.

WRIT of error to the circuit court for the district of Indiana.  
The case is sufficiently stated in the opinion.

*Mr. Porter*, for plaintiffs in error.

*Mr. Vinton* and *Mr. Judah* for defendants.

[ \* 383 ] \* Mr. Justice GRIER delivered the opinion of the court.

The plaintiffs in error were defendants in a suit by Aspinwall and others, in which a judgment was recovered for interest coupons on bonds issued by the corporation. The cause was removed to this court, and may be found reported in 21 Howard, 539. The judgment of the circuit court was affirmed, and the record remitted.

In order to enforce the execution of this judgment, the plaintiffs moved for a *mandamus* to the commissioners to compel them to levy a tax to satisfy the judgment. The record shows that the board of commissioners appeared in the circuit court and resisted the motion on several grounds, but chiefly that the court had no jurisdiction to issue a *mandamus* in this case.

The act of assembly of Indiana, which authorized the issue of the bonds and coupons which were the subject of the litigation, may be found in the former report of the case. (21 How. 542.)

It appears that by the 3d section of this act it is made the duty of the commissioners, for the purpose of paying the interest due on the bonds, "at the levying of the county taxes for each year, to assess a special tax, sufficient to realize the amount of the interest to be paid for the year."

This the commissioners had not done, and refused to do so, on notice and request of the defendants in error.

Now, it is not alleged nor pretended but that, if this judgment

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Board of Commissioners of Knox County v. Aspinwall.

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had been obtained against the corporation in a State court, the remedy now sought could have been obtained ; for it must be admitted, that, according to the well-established principles and usage of the common law, the writ of *mandamus* is a remedy to compel any person, corporation, public functionary, or tribunal, to perform some duty required by law, where the party seeking relief has no other legal remedy, and the duty sought to be enforced is clear and indisputable. That this case comes completely within the category is too clear for argument; for, even assuming that a general law of Indiana permits the public property of the county to be levied \*on and sold for the ordinary indebtedness of the [\*384] county, it is clear that the bonds and coupons issued under the special provisions of this act were not left to this uncertain and insufficient remedy. The act provides a special fund for the payment of these obligations, on the faith and credit of which they were negotiated. It is especially incorporated into the contract, that this corporation shall assess a tax for the special purpose of paying the interest on these coupons. If the commissioners either neglect or refuse to perform this plain duty, imposed on them by law, the only remedy which the injured party can have for such refusal or neglect is the writ of *mandamus*.

Why should not the circuit court of the United States be competent to give to suitors this only adequate remedy?

By the common law, the writ of *mandamus* is granted by the king's bench, in virtue of its prerogative and supervisory power over inferior courts. The courts of the United States cannot issue this writ by virtue of any supervisory power at common law over inferior State tribunals. They can derive it only from the constitution and laws of the United States.

The jurisdiction of these courts is, by the constitution, extended to "controversies between citizens of different States." Congress has authority to make all laws which shall be necessary and proper for carrying this jurisdiction into effect. The jurisdiction of the court to give the judgment in this case is not disputed; nor can it be denied, that by the constitution, congress has the power to make laws necessary for carrying into execution all its judgments. (See *Wayman v. Southard*, 10 Wheaton, 22.) Has it done so?

By the 14th section of the judiciary act of 1789, it is enacted "that courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles of the common law."

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Now, the "jurisdiction" is not disputed, and it is "*necessary*" to an efficient exercise of this jurisdiction that the court [ \* 385 ] \*have authority to compel the exercise of a ministerial duty by the corporation, which by law they are bound to perform, and by the performance of which alone the plaintiff's remedy can be effected. The fund to pay this judgment, by the face of the contract, is a special tax laid and to be collected by defendants. They refuse to perform a plain duty. There is no other writ which can afford the party a remedy, which the court is bound to afford, if within its constitutional powers, except that afforded by this writ of *mandamus*.

It is "agreeable to the principles of the common law," and, consequently, within the category as defined by the statute.

A court of equity is sometimes resorted to as ancillary to a court of law in obtaining satisfaction of its judgments. But no court, having proper jurisdiction and process to compel the satisfaction of its own judgments, can be justified in turning its suitors over to another tribunal to obtain justice. It is no objection, therefore, to the use of this remedy, that the party might possibly obtain another by commencing a new litigation in another tribunal.

We are of opinion, therefore, that the circuit court had authority to issue the writ of *mandamus* in this case.

It is no reason for setting it aside, that a previous alternative writ had not issued. The notices served on the commissioners gave them every opportunity of defense that could have been obtained by an alternative *mandamus*. There was no dispute about facts which could affect the decision. The court gave them an opportunity to comply with the demand of the plaintiffs; their excuse for not doing so was, palpably, "a mere colorable adjournment or procrastination of the performances of the act, for the purpose of delay." It is equivalent to a refusal. Having refused to perform the duty which the law imposed upon them on the proper day, without even the pretense of a reason for such conduct, the peremptory *mandamus* was very properly awarded, commanding the duty to be performed "*forthwith*."

The judgment of the circuit court is, therefore, affirmed with costs.

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Bulkley v. The Naumkeag Steam Cotton Co.

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## THE BARQUE EDWIN.

HENRY T. BULKLEY, Appellant, v. THE NAUMKEAG STEAM COTTON COMPANY.

24 H. 386.

## ADMIRALTY—DELIVERY TO VESSEL.

The bar at the mouth of the harbor of Mobile, some fifteen miles from the city, prevents vessels of large draft or heavily laden to pass over it. It is the custom of shippers at that place for the master of the vessel to hire and pay lighters to receive the freight at the city wharf and bring it to the ship's sides. Held:

1. That a delivery to the lighter by the shipper is a delivery to the master, and is the commencement of the voyage outward.
2. That where the goods are lost by an explosion of the lighter before being received on board the ship, the shipper has a lien on the ship for the failure to deliver the goods at the port of destination, to wit, Boston.
3. The English cases examined on the subject.

APPEAL from the circuit court for the district of Massachusetts, sitting in admiralty. The facts are stated in the opinion.

*Mr. Loring*, for appellant.

*Mr. Andros*, for appellee.

\* Mr. Justice NELSON delivered the opinion of the court. [ \* 389 ]

This is an appeal from a decree of the circuit court of the United States, sitting in admiralty, for the district of Massachusetts.

The libel in the court below was against the barque Edwin, to recover damages for the non-delivery of a portion of a shipment of cotton from the port of Mobile to Boston. The facts upon which the question in this case depends are found in the record as agreed upon by the proctors, both in the district and circuit courts, and upon which both courts decreed for the libellant.

From this agreed state of facts, it appears that the master of the vessel, which was then lying at the port of Mobile, agreed to carry for the libellant 707 bales of cotton from that port to Boston, for certain freight mentioned in the bills of lading.

The condition of the bay of Mobile, which is somewhat peculiar, becomes material to a proper understanding of the question in this case.

\* Vessels of a large size, and drawing over a given depth [ \* 390 ] of water, cannot pass the bar in the bay, which is situate a considerable distance below the city. Their cargo is brought to them in lighters, from the city over the bar, and then laden on board the vessels. Vessels which, from their light draft, can pass

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The Barque Edwin.

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the bar in ballast, go up to the city and take on board as much of their cargoes as is practicable, and, at the same time, allow them to repass it on their return, and are then towed below the bar, and the residue of their load is brought down by lighters and put on board.

In either case, when the vessel is ready to receive cargo below the bar, the master gives notice of the fact to the consignor or broker, through whom the freight is engaged, and provides, at the expense of the ship, a lighter for the conveyance of the goods. The lighter-man applies to the consignor or broker, and takes an order for the cargo to be delivered, receives it, and gives his own receipt for the same. On delivering the cargo on board the vessel below the bar, he takes a receipt from the mate or proper officer in charge.

The usual bills of lading are subsequently signed by the master and delivered.

In the present case, the barque Edwin received the principal part of her cargo at the city, and was then towed down below the bar to receive the residue. The master employed the steamer M. Streck for this purpose, and 100 bales were laden on board of her at the city to be taken down to complete her load, and for which the master of the lighter gave a receipt; after she had passed the bar and had arrived at the side of the barque, but before any part of the 100 bales were taken out, her boiler exploded, in consequence of which the 100 bales were thrown into the water and the lighter sunk. Fourteen of the bales were picked up by the crew of the vessel, and brought to Boston with the 607 bales on board. Eighty bales were also picked up by other persons, wet and damaged, and were surveyed and sold; four remain in the hands of the ship broker, at Mobile, for account of whom it may concern; two were lost.

The master of the barque signed bills of lading, including \* the 100 bales, being advised that he was bound to do so, and that if he refused, his vessel would be arrested and detained. On her arrival at Boston, the master delivered the 607 bales to the consignees, and tendered the fourteen, which were refused.

A question has been made on the argument, whether or not the libellant could recover upon the undertaking in the bills of lading, they having been signed under the circumstances stated, or must resort to the original contract of affreightment between the master and the shipper. The articles in the libel place the right to damages upon both grounds. The view the court has taken of the case supersedes the necessity of noticing this distinction.

The court is of opinion that the vessel was bound for the safe shipment of the whole of the 707 bales of cotton, the quantity contracted to be carried, from the time of their delivery by the shipper at the city of Mobile, and acceptance by the master, and that the delivery of the hundred bales to the lighterman was a delivery to the master, and the transportation by the lighter to the vessel the commencement of the voyage in execution of the contract, the same in judgment of law, as if the hundred bales had been placed on board of the vessel at the city, instead of the lighter. The lighter was simply a substitute for the barque for this portion of the service. The contract of affreightment of the cotton was a contract for its transportation from the city of Mobile to Boston, covering a voyage between these termini, and when delivered by the shipper, and accepted by the master at the place of shipment, the rights and obligations of both parties became fixed—the one entitled to all the privileges secured to the owner or cargo for its safe transportation and delivery; the other, the right to his freight on the completion of the voyage, as recognized by principles and usages of the maritime law.

The true meaning of the contract before us cannot be mistaken, and is in perfect harmony with the acts of the master in furtherance of its execution.

Both parties understood that the cotton was to be delivered to the carrier for shipment at the wharf in the city, and to be transported thence to the port of discharge. After the \*de- [\* 392] livery and acceptance at the place of shipment, the shipper had no longer any control over the property, except as subject to the stipulated freight.

The contract as thus explained being made by the master in the course of the usual employment of the vessel, and in respect to which he is the general agent of the owner, it would seem to follow, upon the settled principles of admiralty law, which binds the vessel to the cargo, and the cargo to the vessel, for the performance of the undertaking, that the ship in the present case is liable for the loss of the hundred bales, the same as any other portion of the cargo.

It is insisted, however, that the vessel is exempt from responsibility upon the ground that the one hundred bales were never laden on board of her, and we are referred to several cases in this court and in England in support of the position. (18 How. 189; 19 Ib. 90; and 2 Eng. L. and Eq. R. 337; *Grant and others v. Norway and others*, 18 Eng. C. L. and Eq. 561; 29 Ib. 323.) But it will be seen, on reference to these cases, the doctrine was applied,

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or asserted, upon a state of facts wholly different from those in the present case. In the cases where the point was ruled, the goods were not only not laden on board the vessel, but they never had been delivered to the master. There was no contract of affreightment binding between the parties, as there had been no fulfillment on the part of the shipper, namely, the delivery of the cargo.

It was conceded no suit could have been maintained upon the original contract, either against the owner or the vessel; but as the bill of lading had been signed by the master, in which he admitted that the goods were on board, the question presented was, whether or not the admission was not conclusive against the owner and the vessel, the bill of lading having passed into the hands of a *bona fide* holder for value.

The court, on looking into the nature and character of the authority of the master, and the limitations annexed to it by the usages and principles of law, and the general practice of shipmasters, held, that the master not only had no general authority to sign the bill of lading, and admit the goods on board when [ 393 \* ] contrary to the fact, but that a third party taking the \* bill was chargeable with notice of the limitation, and took it subject to any infirmity in the contract growing out of it.

The first time the question arose in England, and was determined, was in the case of *Grant and others v. Norway and others*, in the common pleas, (1851,) and was in reference to the state of facts existing in this and like cases, and in connection with the principles involved in its determination, that the court say the master had no authority to sign the bill of lading, unless the goods had been shipped; cases in which there had been no delivery of the goods to the master, no contract binding upon the owner or the ship, no freight to be carried, and, in truth, where the whole transaction rested upon simulated bills of lading, signed by the master in fraud of his owners.

In the present case the cargo was delivered in pursuance of the contract, the goods in the custody of the master, and subject to his lien for freight, as effectually as if they had been upon the deck of the ship, the contract confessedly binding both the owner and the shipper; and, unless it be held that the latter is entitled to his lien upon the vessel also, he is deprived of one of the privileges of the contract, when, at the same time, the owner is in the full enjoyment of all those belonging to his side of it.

The argument urged against this lien of the shipper seems to go the length of maintaining, that in order to uphold it there must be a physical connection between the cargo and the vessel, and that



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the form of expression in the cases referred to is not to be taken in the connection and with reference to the facts of the particular case, but in a general sense, and as applicable to every case involving the liability of the ship for the safe transportation and delivery of the cargo. But this is obviously too narrow and limited a view of the liability of the vessel. There is no necessary physical connection between the cargo and the ship, as a foundation upon which to rest this liability. The unloading of the vessel at the port of discharge, upon the wharf, or even the deposit of the goods in the warehouse, does not discharge the lien, unless the delivery is to the consignee of the cargo, within the meaning of the bill of lading; \*and we do not see why the lien may not [\* 394] attach, when the cargo is delivered to the master for shipment before it reaches the hold of the vessel, as consistently and with as much reason as the continuance of it after separation from the vessel, and placed upon the wharf, or within the warehouse. In both instances the cargo is in the custody of the master, and in the act of conveyance in the execution of the contract of affreightment. We must look to the substance and good sense of the transaction; to the contract, as understood and intended by the parties, and as explained by its terms, and the attending circumstances out of which it arose, and to the grounds and reasons of the rules of law upon the application of which their duties and obligations are to be ascertained, in order to determine the scope and extent of them; and, in this view, we think no well-founded distinction can be made, as to the liability of the owner and vessel, between the case of the delivery of the goods into the hands of the master at the wharf, transportation on board of a particular ship, in pursuance of the contract of affreightment, and the case as made, after the lading of the goods upon the deck of the vessel; the one a constructive, the other an actual possession; the former, the same as if the goods had been carried to the vessel by her boats, instead of the vessel going herself to the wharf.

The decree of the court below affirmed.

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JOHN D. CLEMENTS, Appellant, v. JONATHAN R. WARNER.

24 H. 394.

EQUITY—PRE-EMPTOR SUSTAINED AGAINST PATENTEE.

1. Lands withheld from sale until the State had selected those to which she was entitled under the grant of September 20th, 1850, became subject to sale and pre-emption in 1852.

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- 2 Where C. began a settlement in October, 1852, for which he afterwards claimed and received a certificate of the register and receiver in November, 1856, and a patent for the land, his title is superior to that of W., who paid for and received a certificate of purchase at private sale in November, 1855.

APPEAL from the circuit court for the southern district of Illinois.  
The case is stated in the opinion.

*Mr. Ives*, for appellant.

*Mr. R. E. Williams*, for appellee.

[ \* 395 ] \* Mr. Justice CAMPBELL delivered the opinion of the court.

The appellee filed this bill in chancery in the circuit court to quiet his title to a portion of section thirty-three, in township seventeen north, of range eight east, of the third principal meridian, in the county of Champaigne, Illinois. By the act of congress of the 20th September, 1850, for granting the right of way and making a grant of land to the States of Illinois, Mississippi, and Alabama, in aid of the construction of a railroad from Chicago to Mobile, (9 Statutes at Large, 466,) there was granted to the State of Illinois, for the purpose of making the railroad described in the title of the act, every alternate section of land designated by even numbers, for six sections in width on each side of the road; and in case any of these sections had been sold, or were subject to a pre-emption claim, then the State was authorized to select from the lands of the United States, contiguous to the tier of sections before mentioned, so much land in sections and parts of sections as should make up the full complement of land included in the concessions in the act. The act further provided, that the sections and parts of sections of lands which, by the grant, might remain to the United States within six miles on each side of the road, should not be sold for less than double the minimum price of the public lands, when sold. To comply with the requirements of this act, the commissioner of the general land office withdrew from entry or sale the land on either side of the track of the road, until the State of Illinois could make the selections that

[ \* 396 ] were authorized by it. These \* were completed in 1852,

and during that year the President of the United States by a proclamation directed the sale of those sections and parts of sections along the line of the road that had remained to the United States, after the satisfaction of the grant to Illinois. Such of the sections as were not sold became subject to private entry. The section of land described in the plaintiff's bill, a portion of which forms the subject of this suit, was one of these, and was purchased

at private sale at the land office, in November, 1855, by a person under whom the plaintiff derives his claim, and who has the usual receipt given by the receiver of the land office.

The conflicting claim against which the appellee seeks relief originates in an entry by the appellant in November, 1856, as having a pre-emption right under a settlement began in October, 1855, before the date of the entry on which the title of the appellee is founded. A patent issued to the appellant as having the superior claim. The object of the bill is to reverse the decision of the officers of the land office, and to obtain a relinquishment of the legal title evinced by this patent, and the only question presented is, whether the land was the subject of a pre-emption right in November, 1855.

The 10th section of the act of the 4th September, 1841, confers upon the beneficiaries of that act, "who shall make a settlement in person on the public lands to which the Indian title has been extinguished, and which shall have been surveyed prior thereto, and who shall improve and inhabit the same, as specified in the act, a right of pre-emption to one quarter section of land." Among the exceptions in the act to the exercise of this right of pre-emption, is one that includes "sections of lands reserved to the United States, alternate to other sections granted to any of the States for the construction of any canal, railroad, or other public improvement." 5 Statutes at Large, 466.

Subsequent acts of congress extend the pre-emption privilege to lands not surveyed at the time of the settlement, and confer privileges upon settlers on school lands, and on lands reserved for private claims. 5 Statutes at Large, 620, sections 3, 9.

\*In 1853, the pre-emption laws, as they now exist, were [ \*397 ] extended to the reserved sections of public lands along the lines of all the railroads, wherever public lands have been granted by acts of congress, in cases where the settlement and improvements had been made prior to the final allotment of the alternate sections to such railroads by the general land office. 10 Statutes at Large, 244.

In the administration of these laws, the executive department of the government has decided, that after the restoration to market of the lands embraced in the exception we have quoted from the act of 1841, and when they have become subject to entry at private sale, they lose their character as reserved lands, and will then be subject to the privileges of pre-emption in favor of settlers. The policy of the federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to be-

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come the purchasers of a limited extent of land, comprehending their improvements, over that of any other person.

By the act of 1841, the pre-emption privilege in favor of actual settlers was extended over all the public lands of the United States that were fitted for agricultural purposes and prepared for market. Later statutes enlarged the privilege, so as to embrace lands not subject to sale or entry, and clearly evince that the actual settler is the most favored of the entire class of purchasers. No act of congress has defined the meaning of the term reserve, as applied to lands in these various acts, nor determined explicitly when these alternate sections lose their character as reserves. But all other public lands fitted for agricultural purposes, after they have been offered at public sale, are affected by the privilege of the actual settler to have the preference of entry. No reason of public policy exists to exclude this class of public lands from the operation of the same law, under the same conditions. No violence is done to the language of the act by limiting the exception to the temporary withdrawal of the lands from the market, and the liberal policy of

congress in favor of the actual settler is better accomplished [\* 398] by a restrictive rather than extensive \*interpretation of the exception clause in the act. We therefore sanction the construction adopted in the land office.

The circuit court overruled the demurrer of the defendant to the bill, and made a decree in conformity to the prayer of the bill. This is error. The decree of the circuit court is reversed, and the cause is remanded to the circuit court, with directions to dismiss the bill, with costs.

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LESSEE OF SMITH and BUTT, Plaintiff in Error, v. WILLIAM McCANN.

24 H. 398.

EJECTMENT CANNOT BE SUSTAINED ON AN EQUITABLE TITLE—PAROL EVIDENCE.

1. In Maryland the action of ejectment can only be sustained by a strict legal title in plaintiff.
2. If he has only an equitable title, he must resort to a court of chancery. This is the law of Maryland, and in such cases the local law governs this court.
3. The act of 1810 of that State, which authorized the sale of an equitable interest in land, did not convert that interest into a legal title in the hands of the purchaser.
4. When a deed is offered in support of his title by plaintiff, which on its face makes the grantee the holder of the naked title as trustee for another, he cannot prove by parol evidence that the declared trust was a fraud, and the beneficial interest was in the grantee.
5. If the trusts declared in the deed were fraudulent, the plaintiff's remedy was in a

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court of equity, where the *cestuys que trust* and all others interested could be heard, and in this mode only could complete justice be done.

WRIT of error to the circuit court for the district of Maryland. The case is fully stated in the opinion.

*Mr. Davis* and *Mr. Smith*, for plaintiffs.

*Mr. Campbell* and *Mr. Malcolm*, for defendant.

\* Mr. Chief Justice TANEY delivered the opinion of the [\*401] court.

This case comes up upon a writ of error to revise the judgment of the circuit court for the district of Maryland, in an action of ejectment brought by the plaintiff in error against the defendant to recover certain lands lying in that State.

The plaintiff, in order to show title to the land claimed, offered in evidence, that Smith and Butt, lessors of the plaintiff, having sold cotton to Fenby & Brother, of Baltimore, in 1857, drew on them for the sum due, and their bills were protested to the amount of \$13,708. They thereupon brought suit on the 3d of June, 1857, and recovered judgment in the circuit court on the 6th of April, 1858; and on the 10th of the same month they issued a *fiery facias*, which was on the same day levied by the marshal on the land in controversy; and afterwards,\* on the 2d of Sep- [\*402] tember next following, sold at public auction. At this sale the lessors of the plaintiff were the purchasers, and received from the marshal a deed in due form.

The plaintiff further proved that a certain Robert D. Brown was seized in fee of the land at the times hereinafter mentioned, and read in evidence a deed from him and his wife, dated April 6th, 1857, whereby they conveyed it to Richard D. Fenby, one of the defendants, against whom the judgment was afterwards obtained, stating at the time he offered it in evidence, that he impeached the trusts in the deed for fraud, and intended to show such trusts to be void against him.

The deed purports to be in consideration of \$7,800.50, and recited that the land was purchased by Fenby, from Brown, on the 13th of March, 1852, and then grants to Fenby, "*as trustee*," the lands in question in fee simple, in "trust" for the sole and separate benefit of Jane Fenby, the wife of the said Richard D. Fenby, for and during the term of her natural life, in all respects as if she was a *feme sole*, free from all liability for the debts of her husband, and from and immediately after the death of the said Jane Fenby in trust for such child or children, and descendants of a decer

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child or children of the said Jane, as she may leave living at the time of her death. Such child, children, and descendants, to take *per stirpes*.

The deed gives authority to Fenby to sell and dispose of any part of the trust property, and to invest the proceeds in safe securities upon the same trusts.

The plaintiff further offered evidence tending to prove that Fenby was hopelessly insolvent when this deed was made, and that he was in possession of the land from the time he purchased it in 1852.

The defendant, McCann, then read in evidence a deed from Fenby to him, dated March 23d, 1858, purporting to be made in execution of the power conferred by the trust deed, and conveying the property in fee simple in consideration of twenty-two thousand dollars.

And the plaintiff thereupon offered evidence tending to show that this deed was intended to cover the previous fraud of the [ \* 403 ] one to Fenby ; that McCann was privy to this design, \*and co-operated in it ; that he paid no money ; and that notwithstanding this deed, Fenby continued in possession after the land had been advertised for sale by the marshal, and that the possession was delivered to McCann only a few days before the sale was actually made.

The defendant offered evidence for the purpose of rebutting the charge of fraud against Fenby and himself, and upon the whole testimony as offered, several instructions to the jury were moved for by each of the parties, which were all refused, and the following instruction given by the court :

“ The deed from Robert P. Brown to Richard D. Fenby, of the 6th of April, 1857, conveyed only a naked legal interest to said Fenby, which could not be levied on and sold under a *fi. fa.* issued on a judgment against him, he having no beneficial interest therein. And as the plaintiff, to sustain this action, has offered the said deed in evidence, and as without it there is no evidence of any legal title whatever in said Fenby at the date of the levying of said *fi. fa.*, or at any other time, the plaintiff cannot recover in this action.”

As this instruction disposed of the case, it is unnecessary to state at large the prayers offered by the respective parties, or the testimony upon which they respectively relied to prove or disprove the imputations of fraud.

In discussing the question thus presented by the decision of the court below, it is proper to state, that in Maryland the distinction between common law and equity, as known to the English law, has been constantly preserved in its system of jurisprudence ; and the action of ejectment is the only mode of trying a title to lands.

And in that action the lessor of the plaintiff must show a legal title in himself to the land he claims, and the right of possession under it, at the time of the demise laid in the declaration, and at the time of the trial. He cannot support the action upon an equitable title, however clear and indisputable it may be, but must seek his remedy in chancery; nor is the defendant required to show any title in himself; and if the plaintiff makes out a *prima facie* legal title, the defendant may show an elder and superior one in a stranger, and thereby defeat the action.

\*The law upon this subject is briefly and clearly stated [ \* 404 ] by the court of appeals of the State, in 11 Gill and Johnson, 358, and 4 Maryland Reports, 140, 173.

We state the law of Maryland upon this subject, because very few of the States have preserved the distinction between legal and equitable titles to land. And in States where there is no court of equity, the courts of common law necessarily deal with equitable interests as if they were legal. and exercise powers over them which are unknown to courts of common law, where a separate chancery jurisdiction is established. Cases, therefore, decided in States which have no courts of equity, as contradistinguished from courts of common law, can have no application to this case so far as trusts or any other equitable interest is involved. And even in States where the chancery jurisdiction has been preserved, the decisions of their respective courts do not always harmonize in making the line of division between law and equity. And as the title to real property, whether legal or equitable, and the mode of asserting that title in courts of justice, depend altogether upon the laws of the State in which the land is situated, cases like that now before the court are questions of local law only, in which we must be guided by the decisions of the State tribunals.

Since the passage of the act of George 2d, which made lands in the American colonies liable to be sold under a *fi. fa.* issued upon a judgment in a court of common law, the process of extent has fallen into disuse, and is regarded as obsolete in Maryland. But this statute did not interfere with the established distinction between law and equity, and an equitable interest could not be seized under a *fi. fa.* until the law of Maryland was in this respect altered by an act of assembly of the State in 1810. But this law does not convert the equitable interest into a legal one, in the hands of the purchaser. He buys precisely the interest which the debtor had at the time the execution was levied; and if he purchased an equitable interest and desires to perfect his title, he must go into equity, where the court will decree a conveyance to him fr

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[ \* 405 ] \* the holder of the legal title, if he shows that the debtor was entitled to it at the time of the levy.

But the statute of George 2d, which authorized the sale of lands under a *fi. fa.*, did not authorize the sheriff to deliver them, nor the court to issue the writ of *hab. fac. poss.* upon the return of the process. And the result of this was, that the purchaser was compelled to bring an ejectment to obtain the possession, in which, as we have already said, he must show a legal title to the land; and consequently must show that the debtor, at the time of the levy, had a legal title, and such a title as was subject to seizure and sale under the *feri facias*. And if the debtor had but an equitable title, the purchaser was compelled to go into equity, and obtain a legal one before he could support an action of ejectment against the party in possession. A more summary process in certain cases has been since provided by a law of the State passed in 1825. But up to that time the principles above stated were the settled law of the State; and remain so, except in so far as they are altered by that act of assembly. It is unnecessary to state the provisions of that act, because the plaintiff did not proceed under it. He has resorted to the action of ejectment to obtain possession, and cannot recover, unless he can show a legal title to the premises. It is not, however, every legal interest that is made liable to sale on a *fi. fa.* The debtor must have a beneficial interest in the property. And in *Houston v. Newland*, 7 Gill and Johnson, 493, where a party had sold the land to another *bona fide*, but had not conveyed the legal title, the court held that the title remaining in the vendors was a barren legal title, in trust for the purchaser, and could not be sold for the payment of his debts. And a still later case, 10 Gill and Johnson, 443, 451, 452, *Matthews v. Ward's Lessee*, where land had been conveyed to a trustee, in trust for third persons, and the *cestuys que trust* had died without heirs, the court decided that the land escheated to the State, although the heirs of the trustee to whom the legal estate was conveyed were still living, and said that "the rights of such trustee, who is a mere instrument, are treated with no respect, and the State deals with the property as her own.

[ \* 406 ] \* We proceed to apply these principles to the case before us. The deed to Fenby, in plain and unambiguous words, conveyed to him a naked legal title; he took under it no interest that could be seized and sold by the marshal upon a *fi. fa.*; and the deed of the marshal, therefore, conveyed no title to the lessors of the plaintiff. Standing only upon this title, derived under



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this deed to Fenby, and showing no other title, he certainly could not recover in an action of ejectment.

But the plaintiff offers evidence to prove that the trusts in the deed are fraudulent, and that Fenby purchased the land and procured the deed from Brown in this form, in order to hinder and defraud his creditors. And he offers this proof to show that Fenby had a beneficial interest in the property, liable to be seized and sold for the payment of his debts.

The proposition to enlarge or change the legal estate of the grantee in a deed, by parol evidence, against the plain words of the instrument, is without precedent in any court of common law. And in the case of *Remington v. Linthicum*, relied on by the plaintiff, the evidence was offered, not to change the estate limited in the grant, but to show that the grant was fraudulent, and utterly void, and conveyed no interest whatever to the grantee named in it. The party offering the evidence did not claim under that deed, but against it. And if, in this case, the evidence was offered for a like purpose, and the deed proved to be fraudulent and void, it would defeat the plaintiff's action instead of supporting it.

He does not, however, offer the parol evidence for this purpose, but offers it to enlarge the estate of Fenby, and to show that he had not merely a barren legal title, but a beneficial interest, which was liable for the payment of his debts. But if the evidence were admissible, we do not perceive how the fraudulent character of the trusts, as against his creditors, could enlarge his legal interest beyond the terms of the deed. It is true he paid the money for the property. And if this circumstance could be supposed to create a resulting trust for the benefit of Fenby, it would be a mere equitable right exclusively within the jurisdiction of a court of chancery, and a court of common law could neither enforce it nor notice it; \*and consequently it would not be a title upon [ \* 407 ] which an action of ejectment could be maintained. But it obviously is not a case to which the doctrine of resulting trusts can be applied; for, as between Fenby and the *cestuys que trust*, he can have no equity against the express trusts to which he assented, and which, indeed, according to the plaintiff's allegation, he procured to be made. And when the deed is offered in evidence by the plaintiff, in order to derive to himself a legal title under it, the interests and estates thereby conveyed cannot be enlarged or diminished by testimony *dehors* the deed. The deed must speak for itself.

If these trusts are fraudulent, the lessors of the plaintiff have a plain and ample remedy in the court of chancery, which has the

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exclusive jurisdiction of trusts and trust estates. In that forum all of the parties interested in the controversy can be brought before the court, and heard in defense of their respective claims. But as the case now stands, the only interest which the plaintiff seeks to impeach is that of the *cestuys que trust*; yet they are not before the court, nor can they by any process be made parties in this ejectment suit, nor even be permitted to make themselves parties if they desired to do so, and cannot have an opportunity of adducing testimony in defense of their rights. Under such circumstances, an inquiry into the validity of these trusts would not only be inconsistent with the established principles and jurisdiction of courts of common law, but also inconsistent with the great fundamental rule in the administration of justice, which requires that every one shall have an opportunity of defending his rights before judgment is pronounced against him.

The judgment of the circuit court is therefore affirmed.

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JOSEPH H. ADLER and others, Plaintiffs in Error, v. AARON D. FENTON and others.

24 H. 407.

CONSPIRACY TO DEFRAUD GENERAL CREDITOR NOT ACTIONABLE.

1. In the absence of special legislation, a general creditor cannot bring an action on the case against his debtor, or those combining and colluding with him, to make dispositions of his property, although the object of those dispositions be to hinder and delay creditors.
2. The owner of property has the absolute right to sell and dispose of it; and where a creditor has no judgment or other lien or claim on it for his debt, the motive with which it was sold and bought gives him no right of action. If injured, it is *damnum absque injuria*.
3. Hence, where a creditor whose debt was not yet due sued his debtor and others for a conspiracy to defraud him by the disposition of the goods for which the debt was created, he cannot recover, though he proved that the purpose of the debtor and the purchaser from him was to defraud the plaintiff and to hinder and delay creditors.

WRIT of error from the district court for the district of Wisconsin.  
The facts are stated in the opinion.

*Mr. Doolittle* and *Mr. Brown*, for plaintiffs.

*Mr. Lynde*, for defendants.

[ \* 408 ] \*Mr. Justice CAMPBELL delivered the opinion of the court.

This action was instituted by the defendants in error in the district court, as creditors of two of the plaintiffs in error, Adler

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and Schiff, upon the complaint that this firm had combined and conspired with their co-defendants in the court below, to dispose of their property fraudulently, so as to hinder and defeat their creditors in the collection of their lawful demands. By means of which fraudulent acts, they affirm they suffered vexation and expense, and finally incurred the loss of their debt.

The defendants pleaded the general issue. Upon the trial, \*the plaintiffs proved that Adler and Schiff were [\*409] traders in Milwaukie, and to carry on their business, in August, 1857, purchased of the plaintiffs and other merchants in New York, upon credit, a large quantity of merchandise, which, with their other property, shortly after its delivery at Milwaukie, was assigned to one of their co-defendants, for the ostensible purpose of paying their debts, but really with the purpose of more effectually concealing it from the pursuit of their creditors.

There was testimony conducing to convict all the defendants of a common design to accomplish this purpose. The plaintiffs had extended a credit to Adler and Schiff of two, four, and six months. They caused an attachment to issue against this firm upon all their debt which had become due at the time these transactions occurred, which was levied upon sufficient property to satisfy it, and afterwards, and before the maturity of their remaining demand, this suit was commenced. At the time of the trial, this demand was their only claim against Adler and Schiff.

The defendants requested the court to instruct the jury "that a creditor at large, as such, has no legal interest in the goods of his debtor, and cannot maintain an action for any damages done to such property; and that if the defendants had been guilty of a conspiracy to remove the property of a debtor, and thereby to defraud his creditors, a creditor at large, not having a present right of action against such debtor, has not such an interest in the subject of the fraud as to enable him to maintain an action for damages against the defendants, and that the declaration discloses no cause of action against the defendants." The court declined to give this instruction, but charged the jury "that the plaintiffs sold their goods to Adler and Schiff on credit; they had no interest in the goods sold, or in the other property of these defendants, but an interest in the debt owing for the goods so sold on credit. And if the defendants have been guilty of a conspiracy to remove the property of Adler and Schiff, and they did so remove their property with intent to defraud the plaintiffs in the collection of their debt when it should become payable, even though it was not payable when such removal was effected, the plaintiffs have

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[ \* 410 ] \*a cause of action after the debt became payable." To enable the plaintiffs to sustain an action on the case like the present, it must be shown that the defendants have done some wrong, that is, have violated some right of theirs, and that damage has resulted as a direct and proximate consequence from the commission of that wrong. The action cannot be sustained, because there has been a conspiracy or combination to do injurious acts. In *Savile v. Roberts*, 1 Lord R. 374, Lord Holt said, "it was objected at the bar against these old cases, that they were grounded upon a conspiracy, which is of an odious nature, and therefore sufficient ground for an action by itself. But to this objection he answered, that conspiracy is not the ground of these actions, but the damages done to the party; for an action will not lie for the greatest conspiracy imaginable, if nothing be put in execution." There are cases of injurious acts for which a suit will not lie, unless there be fraud or malice concurring to characterize and distinguish them. But in these cases the act must be tortious, and there must be consequent damage. An act legal in itself, and violating no right, cannot be made actionable on account of the motive which superinduced it. It is the province of ethics to consider of actions in their relation to motives, but jurisprudence deals with actions in their relation to law, and for the most part independently of the motive. In *Hutchins v. Hutchins*, 7 Hill N. Y. R. 104, the defendants had successfully conspired to induce a testator by fraudulent representations to alter a will he had made in favor of the plaintiff.

The court said, "for injuries to health, liberty, and reputation, or to rights of property, personal or real, the law has furnished appropriate remedies. The former are violations of the absolute rights of the person, from which damage results as a legal consequence. As to the latter, the party aggrieved must not only establish, that the alleged tort or trespass has been committed, but must aver and prove his right or interest in the property or thing affected, before he can be deemed to have sustained damages for which an action will lie." And because the plaintiff had a mere possibility of

benefit, and was deprived only of hopes and expectations, [ \* 411 ] it was decided \*that the action in that case would not lie.

In *Stevenson v. Newnham*, 13 C. B. R. 285, it was determined, that when the act complained of is not unlawful *per se*, the characterizing it as malicious and wrongful will not be sufficient to sustain the action. In the present suit, the plaintiffs do not allege that they were defrauded in the contract of sale of their merchandise, although there is abundant testimony to show that the purchases were made by Adler and Schiff, with the intention

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of defrauding their vendors. But the plaintiffs, by electing to sue for the price, have waived that fraud, and confirmed the sale. Adler and Schiff were the lawful owners of the property at the time this suit was commenced. They had the legal right to use and enjoy it to the exclusion of others, and no one had any right to interfere with their use or disposition; none, unless there be a right conferred by the law upon a creditor to prevent the accomplishment of fraud by his debtor, and to pursue him, and others assisting him, for a revocation of acts done to hinder, delay, or defraud him, in the collection of his demand.

The authorities are clear, that chancery will not interfere to prevent an insolvent debtor from alienating his property to avoid an existing or prospective debt, even when there is a suit pending to establish it. In *Moran v. Dawes*, Hopkins' Ch. R. 365, the court says: "Our laws determine with accuracy the time and manner in which the property of a debtor ceases to be subject to his disposition, and becomes subject to the rights of his creditor. A creditor acquires a lien upon the lands of his debtor by a judgment; and upon the personal goods of the debtor, by the delivery of an execution to the sheriff. It is only by these liens that a creditor has any vested or specific right in the property of his debtor. Before these liens are acquired, the debtor has full dominion over his property; he may convert one species of property into another, and he may alienate to a purchaser. The rights of the debtor, and those of a creditor, are thus defined by positive rules; and the points at which the power of the debtor ceases, and the right of the creditor commences, are clearly established. These regulations cannot be contravened or varied by any \*interposition of equity. [\*412] There are cases in which the violation of the rights of a creditor within these limits has formed the subject of an action at law against third persons. *Smith v. Tonstall*, Carth. 3; *Penrose v. Mitchell*, 8 S. and R. 522; *Kelsy v. Murphy*, 26 Pen. R. 78; *Yates v. Joyce*, 11 John. 136. But the analogies of the law, and the doctrine of adjudged cases, will not allow of an extension by the courts of the remedy employed in those cases in favor of a general creditor. This subject was discussed much at large in *Lamb v. Stone*, 11 Pick. 527.

"The plaintiff complained of the fraud of the defendant in purchasing the property of his absconding debtor, in order to aid and abet him in the fraudulent purpose of evading the payment of his debt. The court ask, what damage has the plaintiff sustained by the transfer of his debtor's property? He has lost no lien; for he had none. No attachment has been defeated; for none had been

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made. He has not lost the custody of his debtor's body; for he had not arrested him. He has not been prevented from attaching the property, or arresting the body of his debtor; for he had never procured any writ of attachment against him. He has lost no claim upon, or interest in the property; for he never acquired either. The most that can be said is, that he intended to attach the property, and the wrongful act of the defendant has prevented him from executing this intention. \* \* \* On the whole, it does not appear that the tort of the defendant caused any damage to the plaintiff. But even if so, yet it is too remote, indefinite, and contingent, to be the ground of an action." The same court reaffirmed this doctrine in *Wellington v. Small*, 3 Cushing R. 146.

Unquestionably, the claims of morality and justice, as well as the legitimate interests of creditors, require there should be protection against those acts of an insolvent or dishonest debtor that are contrary to the prescriptions of law, and are unfaithful and injurious. But the legislature must determine upon the remedies appropriate for this end; and the difficulty of the subject is evinced by the diversity in the systems of different States for adjusting the relations of creditor and debtor, consistently with equity and humanity. Bankrupt and insolvent laws, laws allowing of attachment and sequestration of the debtor's estate, and for the revocation of fraudulent conveyances, creditors' bills, and criminal prosecutions for fraud or conspiracy, are some of the modes that have been adopted for the purpose. In the absence of special legislation, we may safely affirm, that a general creditor cannot bring an action on the case against his debtor, or against those combining and colluding with him to make dispositions of his property, although the object of those dispositions be to hinder, delay, and defraud creditors. The charge of the district judge is erroneous, and the judgment of that court is reversed, and the cause remanded for further proceedings.

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ARNOLD MEDBERRY and others, Plaintiffs in Error, v. THE STATE OF OHIO.

24 H. 413.

JURISDICTION OVER STATE COURTS.

1. Where the question is of the jurisdiction of this court over a judgment of a State court, it may be determined from an examination of the pleadings, bill of exceptions, or certificate of that court; but the assignment of errors and the published opinion of the court make no part of the record, to which alone this court can resort.

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2. This court has no jurisdiction to decide whether an act of the State legislature is in conflict with the State constitution on a writ of error to the State court.

MOTION to dismiss writ of error to supreme court of Ohio.

*Mr. Wolcott* and *Mr. Stanton*, for the motion.

*Mr. Pugh*, *per contra*.

\**Mr. Justice GRIER* delivered the opinion of the court. [\* 414]

The defendant in error moves to dismiss this case for want of jurisdiction, because the record does not present any question which this court has authority to re-examine, by the 25th section of the judiciary act.

The construction of this section has been so often before this court, and the cases are so numerous which define and establish the conditions under which we assume jurisdiction, that it would be tedious to notice them, and superfluous to repeat or comment upon them.

For the purposes of this case, it is only necessary to say, "that it must appear from the record of the case, either in express terms or by clear and necessary intendment, that one of the questions which this court has jurisdiction to re-examine and decide was actually decided by the State court."

This may be ascertained either from the pleadings, or by bill of exceptions, or by a certificate of the court. But the assignment of errors, or the published opinion of the court, cannot be reviewed for that purpose. They make no part of the record proper, to which alone we can resort to ascertain the subject-matter of the litigation.

In this case, the declaration counts upon a contract made by the plaintiffs with the board of public works of Ohio, in 1855, for keeping a portion of the canal in repair for five years. It avers performance, and readiness to perform, and that those officers, acting under and by authority of an act of assembly of Ohio, entitled "An act making appropriations for the public works for 1857," "in violation and in open disregard of such contract, did wrongfully hinder and prevent," &c.

The supreme court gave judgment for the defendants on a demurrer to this declaration.

It is not averred in the pleadings, or anywhere on the record, that this or any statute of Ohio was void, because it impaired the obligation of contracts.

The only legitimate inference to be drawn from the face of this record is, that the supreme court decided that the board of public

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works had no authority to make such contract. If we go [ \* 415 ] out of the record to search for the reasons, we find no \*evidence that there was any complaint that the act of 1857 was contrary to the constitution of the United States, or that the court gave their judgment for the defendant on account of any of its provisions. It is not referred to, except for the purpose of showing that the plaintiffs might bring their suit against the State for damages. The contract declared on was made by virtue of an act of assembly of 1845. In 1851, the people of Ohio formed a new constitution. This contract was made in 1855.

The only question presented to the court, and decided by them, was, whether the provisions of the act of 1845 were consistent with those of the new constitution.

This is a question of which this court has no authority to take judicial cognizance.

The writ of error is therefore dismissed.

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JAMES D. PORTER and others, Plaintiffs in Error, v. BUSHROD W. FOLEY.

24 H. 415.

JURISDICTION OVER STATE COURTS.

Where plaintiffs in error objected to a deed, because the statute which authorized it was unconstitutional and void, it was properly held by the State court that the objection related to the State and not to the federal constitution; and from this decision of the State court no writ of error lies in this court.

THE motion to dismiss the writ for want of jurisdiction was argued by *Mr. Mooar* for the motion, *Mr. Headington* opposed.

[ \* 420 ] \* Mr. Justice GRIER delivered the opinion of the court.

The record of this case does not show that any question arose or was decided by the State court, which this court has authority to re-examine by virtue of the 25th section of the judiciary act.

Without entering into a tedious analysis of the case, it is sufficient to state, that the chief or only question in it was, whether an act of assembly of Kentucky, authorizing an executor to sell the real estate of minors, was a valid exercise of power by the legislature.

The counsel for plaintiff objected to the admission of the deed made in pursuance of such authority, "because said act and supplement were unconstitutional and void."



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This objection was very properly construed by the court as having reference to the validity of the act of the legislature of Kentucky, not as contrary to any provision of the constitution of the United States, but as raising the question whether the legislature had a power under the constitution of that State, by general or special enactment, to authorize the sale of real estate of infants. The court decided that it had such power; and if it had, it is abundantly evident that there is no article nor clause in the constitution of the United States which could interfere with it.

Let the writ of error be dismissed.

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WILLIAM C. REDDALL, Plaintiff in Error, v. N. H. BRYAN and others.

24 H. 421.

JURISDICTION OVER STATE COURTS.

The bill of complaint in the State court prayed an injunction, on the ground that defendants were, under claim of acts of congress, doing acts to his injury unauthorized by those acts. Held:

1. That from a decree of the court of appeals of Maryland, affirming the order of the court below, refusing the injunction, no writ of error would lie to this court, because it was only an interlocutory order, no decree having been entered to dismiss the bill.
2. Because the order which was affirmed supported the rights claimed under the act of congress, and did not decide against such a right.

WRIT of error to the court of appeals of the State of Maryland. The case is well stated in the opinion.

*Mr. John S. Tyson and Mr. Mayer*, for plaintiffs.

*Mr. Stanton*, attorney general, for defendants.

Mr. Chief Justice TANEY delivered the opinion of the court.

This is a writ of error to revise the decree of the court of appeals of Maryland, affirming a decree of the circuit court for Montgomery county, in that State.

This case, as it appears on the record, is this:

The bill in equity of the plaintiff in error, filed in the circuit court for Montgomery county, in Maryland, alleges that the defendants have trespassed on land of his in Montgomery county, in Maryland, digging it up and erecting abutments and structures for an aqueduct, and so breaking up and dividing the land as to render it incapable of tillage, and inflicting great and irreparable damage upon the complainant; and that the defendants meditate, for completing the aqueduct, still further damage, of the same aggravated

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character, to the land, by digging to great depths of twelve to fifteen feet, and at other points raising embankments and building walls, and in conducting through the land a large and constant stream of water, for the sole use of the aqueduct.

The bill further states that the defendants claim to thus act under authority of the executive of the United States, unsanctioned, however, as the bill alleges, by any action of congress, and for supplying water to the cities of Washington and Georgetown, and under color of an act of the legislature of Maryland, (session of the year 1853, chapter 179,) purporting to authorize the United States [ \* 422 ] "to purchase land in Maryland \*for so supplying water, through construction of dams, reservoirs, buildings, and other works," and in case of sale not being agreed by owners, to allow the United States to adversely appropriate to herself the land, by condemnation and on valuation, to be effected in manner as provided in case of the Chesapeake and Ohio Canal Company's occasions for land and materials for that company's works.

The bill also avers that no such purchase was authorized by congress, nor any attempt ever made on behalf of the United States toward an agreement for the purchase of complainant's lands, and insists that these pretended sanctions of the act of the Maryland legislature, and of the United States executive, are repugnant to the constitution of the United States and of Maryland, and that the land is thus intruded on for no public purpose of Maryland, nor for any connected with the United States as such, and of a federal character, nor even so declared in the Maryland act of legislature, or in any action of congress. And the bill prays injunction, to prevent the trespass and encroachments complained of from being carried on. The circuit court refused the injunction, and from the order of refusal, the plaintiff appealed to the court of appeals. That court affirmed the order of the circuit court and remanded the case.

From this decision of the court of appeals, the case is here upon writ of error.

It is evident, from this statement, that the appeal to this court cannot be sustained. In the first place, the decree of the court of appeals merely affirms the decree of the inferior court, and remands the case. It is, therefore, still pending, and there is no final decree. And although the State of Maryland in her own courts may authorize an appeal from such an interlocutory order, it cannot affect the jurisdiction of this, which is governed by the act of congress, and that act authorizes the writ of error only in cases where there is a final decree or judgment.

In the second place, we do not see in the plaintiff's bill any right

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claimed under the laws of the United States. On the contrary, the claim is against the rights asserted by the United \*States, and exercised by the agents of the government [ 423 \* ] under its authority ; and even if there had been a final decree by the dismissal of the bill, in addition to the refusal of the injunction, we perceive no ground upon which the writ of error could be maintained under the 25th section of the act of 1789.

It is therefore dismissed for want of jurisdiction.

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JOSEPH A. SHIERBURN, Plaintiff in Error, v. JACOB DE CORDOVA and others.

24 H. 423.

TEXAS LAND LAW—EJECTMENT CAN ONLY BE SUSTAINED ON THE LEGAL TITLE IN FEDERAL COURTS.

Notwithstanding a statute of Texas, which declares head-right certificates which have been located sufficient to maintain actions of ejectment, they are still but equitable titles ; and that statute cannot change the rule of the federal courts that such actions can only be sustained on a legal title. *Fenn v. Holme*, 21 How. 481, (3 Miller, 111,) re-affirmed.

WRIT of error to the district court for the western district of Texas.

The question on which the case turned in this court was not raised in the court below, but was by counsel here.

*Mr. Hale*, for plaintiff in error.

*Mr. Paschal*, for defendants.

\*Mr. Justice CAMPBELL delivered the opinion of the [ \* 425 ] court.

This was a suit by the plaintiff to recover a parcel of land in the county of Guadalupe, in the State of Texas. The title of the plaintiff consists of certain entries of head-rights embracing the land in dispute. One of these is in these words: Joseph A. Shierburn, assignee of Victor Ed. Gaillon, enters one-third of a league of land, situated on a noted island, about six miles above the town of Walnut Springs, and extending on the main land on the northeast side of the Guadalupe river for quantity ; the said location is also a short distance below a very elevated mound on the west of the river. Certificate 222. Harrisburg county, October 16, 1838. In January, 1853, the plaintiff applied to the district surveyor of Guadalupe county for the survey of this and other land embraced in the entries, who declined to execute the surveys, but

*Tracy v. Holcombe.*

it is admitted that the entries cover the land in controversy. The defendants relied upon a Mexican grant, issued in 1831 in favor of Antonio Maria Esnurizar, for eleven leagues of land, and which embraces the same land. The district court pronounced this grant to be a valid appropriation of the land described in it, and the plaintiff alleges that there is error in that decision.

By a statute of Texas, "all certificates for head-rights, land scrip, bounty warrants, or any other evidence of right to land recognized by the laws of this government, which have been located or surveyed, shall be deemed and held as sufficient title to authorize the maintenance of actions of ejectment, trespass, or any other [ \* 426 ] legal remedy given by law." Hart. \*Dig., art. 3,230.

The testimony adduced by the plaintiff, it would seem, would have authorized a suit in the courts of Texas, where rights, whether legal or equitable, are disposed of in the same suit. But this court has established, after full consideration, that in the courts of the United States suits for the recovery of land can only be maintained upon a legal title. It is not contended in this case that the plaintiff has more than an incipient equity. This question was so fully considered by the court in *Fenn v. Holme*, 21 How. 481, that a further discussion is unnecessary.

Judgment of the district court affirmed.

ALFRED H. TRACY, Plaintiff in Error, *v.* WILLIAM HOLCOMBE.

24 H. 423.

## JURISDICTION OVER STATE COURTS.

A judgment of the appellate court of a State reversing the judgment of the inferior court, and sending it back for a new trial, is not such a final judgment as will sustain a writ of error.

WRIT of error to the supreme court of the State of Minnesota. The facts are stated in the opinion.

*Mr. Phillips*, for plaintiff, submitted the case on the record.

[ \* 427 ] \**Mr. Chief Justice TANEY* delivered the opinion of the court.

This case has been brought here by a writ of error directed to the supreme court of the State of Minnesota. But upon looking into the transcript, it appears that the judgment which it is proposed to revise is a judgment reversing the decision of the court below, and awarding a new trial. There is, therefore, no final judgment in

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the case, and the writ must be dismissed for want of jurisdiction in this court.

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JAMES H. SUYDAM, Plaintiff in Error, v. W. H. WILLIAMSON.

24 H. 427.

DECISIONS OF STATE COURTS BINDING ON FEDERAL COURTS, WHERE THEY ESTABLISH  
FIXED RULES OF TITLE ON REAL PROPERTY.

Where this court has made a decision affecting title to real estate, and the highest court of the State in which the contest was had subsequently decides the law of that State to be well settled otherwise, this court will, in another case coming before it after this, follow the State decisions instead of its own, where the question is identical.

WRIT of error to the circuit court for the southern district of New York. The matter is sufficiently stated in the opinion.

*Mr. Ellingwood*, for plaintiff.

*Mr. David Dudley Field*, for defendant.

\*Mr. Justice CAMPBELL delivered the opinion of the court. [ \* 428 ]

This was an action of ejectment in the circuit court for certain lots of land in the city of New York, by the defendants in error, against the plaintiff in error. The plaintiff in the circuit court claimed, under a devise in the will of Mary Clarke, who died in the year 1802, by which she gave to trustees therein named that part of the farm upon which she resided, and which she owned, called Chelsea, in trust, to receive the rents, issues, and profits thereof, and to pay the same to Thomas B. Clarke, during his natural life; and from and after the death of said Thomas B. Clarke, in further trust to convey the same to the lawful issue of the said Thomas B. Clarke, living at his death, in fee. The property in dispute is a portion of this estate. Thomas B. Clarke died in 1826, and the plaintiffs have the title to this property of his three children, who were living at his death.

The defendant's title is deduced from Thomas B. Clarke, who disposed of the property under the authority of certain acts of the legislature of the State of New York, and orders of the court of chancery of that State.

In March, 1814, T. B. Clarke represented to the legislature the existence and terms of the will of Mary Clarke, and that the trustees named in the will were consenting to such acts of the legislature of the State as it might deem proper to pass for his relief, and also requested, with their sanction, that another trustee might be

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substituted in their stead; and further represented, that the estate could not be so improved and made productive as to fulfill the object of the testator; that he had married and had a family of five children, and that some other disposition of the estate was essential for the support of his family and himself. The legislature thereupon passed an act for the discharge of the trustees named in the will, and empowered the court of chancery to appoint one or more trustees to execute and perform the trusts and duties specified in the will and in their act. The act authorized the subdivision of a specified portion of the farm into city lots, and their sale within a convenient time thereafter, with the assent of said [ \* 429 ] \* Clarke, and for the investment and application of the income of the proceeds of the sales.

In March, 1815, upon the petition of Thomas B. Clarke, representing that he could not procure a suitable person to execute the trusts of the act of 1814, and that no other person was interested in the property beside his family and himself, an act was passed authorizing Clarke to become trustee, in like manner and with like effect that trustees duly appointed under the said act might have done, and that the said Clarke might apply the whole of the interest and income of the said property to the maintenance and support of his family, and the education of his children; and that no sale should be made until the said Clarke should have procured the assent of the chancellor of the State to such sale, who shall, at the time of his giving such assent, direct the mode in which the proceeds of sale, or so much thereof as he shall think proper, shall be vested in the said Thomas B. Clarke, as trustee; and further, that it shall be the duty of the said Clarke to render an account annually, to the chancellor, of the principal, the interest being applicable as the said Clarke might think proper, for his own use and benefit, and the maintenance and support of his children.

After the passing of this act, the chancellor, upon the petition of Clarke, made sundry orders for the sale of the lots and the appropriation of the proceeds of sale, under the directions of a master of the court. In one of these orders the chancellor directed that so much of the net proceeds to arise from the sales be applied, under the direction of one of the masters of the court, for the payment and discharge of the debts now owing by the petitioner, and to be contracted for the necessary purposes of his family.

In March, 1816, the legislature of New York further enacted, that the said Clarke, under the order heretofore granted by the chancellor, or under any subsequent order, might mortgage or sell the premises which the chancellor permitted or might permit him

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to sell as trustee under the will of Mary Clarke, and to apply the money so raised by mortgage or sale to the \*pur- [ \* 430 ] poses required or to be required by the chancellor, under the acts theretofore passed for his relief.

In March, 1817, the chancellor authorized Clarke to sell the southern half of the property included in the devise, and to convey any part or parts of the said estate in payment and satisfaction of any debt due and owing from the said Clarke, upon a valuation to be agreed on between him and his respective creditors; provided, nevertheless, that every sale and mortgage, and conveyance in satisfaction, that may be made by the said Thomas Clarke, shall be approved by one of the masters of the court, and that a certificate of approval be endorsed upon every deed or mortgage to be made in the premises; and that the said Clarke be authorized to receive and take the moneys arising from the premises, and apply the same to the payment of his debts, and invest the surplus in such manner as he may deem proper, to yield an income for the maintenance and support of his family.

In October, 1818, Thomas B. Clarke executed a deed to Peter McIntyre for a number of lots, including those described in the declaration, in which he recited that he had been empowered to sell, or mortgage, or convey, in satisfaction of any debt due from him to any person, the property devised by Mary Clarke, as aforesaid; and that Clarke was indebted to McIntyre in a large sum of money; and that in consideration of the premises, and of thirty-seven hundred and fifty dollars, the receipt of which he acknowledged, he granted, &c., &c., in fee simple to McIntyre.

The master in chancery endorsed upon the deed an approval, that "having examined the within deed, he approved it in manner and form," and contemporaneously conveyed to McIntyre an interest he held as trustee for Clarke.

Upon the trial, it appeared that the sale was made upon the consideration of some debts of Clarke, that McIntyre assumed to pay; of occasional advances of small sums of money to Clarke, and payment of bills, in which the children were interested; of some two or three years of board of Clarke and a portion of his children, and two notes for about fifteen or sixteen hundred dollars. It was shown that others of the \*children were neglected by [ \* 431 ] Clarke, and subsisted through the bounty of friends and relatives.

The defendant connects himself with the title of McIntyre as a purchaser at a sale of the property under a decree of foreclosure of his mortgage, in 1844, by the court of chancery in New York.

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The plaintiffs impugn the proceeding under which the conveyance to McIntyre was made, and the sufficiency of the consideration to support the conveyance. They contend that every material question in this case is *res judicata* in this court, having been adjudged in the cases of *Williamson v. Berry*, 8 How. 495, 549, *Williams v. The Irish Presbyterian Church*, 8 How. 565, and *Williamson v. Ball*, 8 How. 566. They insist that it is not material whether the court of appeals of New York persist in their adherence to the decision in the case of *Cochran v. Van Surley*, 20 Wend. 365. If they are not willing to re-examine the grounds of that decision, that is not a reason why this court should recede. The decision here was made, after great deliberation, with the decision in *Cochran v. Van Surley* before it. Property has since been bought and sold upon the faith of the opinion here delivered, and the judgment by this court pronounced. Every principle by which our law of precedents is justified, tends against the reopening of the case in this court.

The litigation in respect to the property conveyed by Clarke, under the authority derived from the acts of the legislature, and the orders of the chancellor, commenced before the death of Clarke. *Sinclair v. Jackson*, 8 Cow. 543.

The case of *Clarke v. Van Surley* was tried at the New York circuit in 1833, and was decided in the supreme court in 1836. 15 Wend. 436. It was removed to the court for the correction of errors, and was affirmed in that court, but with much division in the court, in 1838. *Cochran v. Van Surley*, 20 Wend. 365.

The decree of foreclosure and sale, under which the defendant claims, was rendered in 1840, and the sale took place in 1844. The purchaser, subsequently to the sale, objected to complying [ \* 432 ] with his purchase, because of a notice from the devisees of Mary Clarke, that they were claimants of the property, and forbade his entering upon the same. The vice chancellor, upon the motion requiring the purchaser to comply, and the chancellor, upon appeal from his order, compelled the purchaser to complete his purchase. The reasons for this order do not appear. But the vice chancellor and chancellor might have said, that it had become the settled law of the State that such a title was valid, and could have rested upon the authority of the case of *Clarke v. Van Surley*.

In 1851 the case of *Towle v. Farley* came before the superior court of the city of New York, and involved the title to one of the lots conveyed to McIntyre by Clarke, and sold under the decree of foreclosure. That case was determined in that court, and its judgment affirming the validity of that title was sanctioned in the court



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of appeals subsequently to the decisions reported in the 8th Howard, in this court. The court of appeals, in answer to the argument derived from the adjudication in this court, say, that perhaps there may be a difference between the cases which were determined in this court in 1851 and that case, but that the more suitable answer is, that as between the judgments of their own courts, and those of the courts of the United States, their own are binding where there is a conflict between them, except in cases arising under the constitution and laws of the United States, when the judgments of the supreme court of the United States are of controlling authority. That court declares that the judgment in *Clarke v. Van Surley* is a determination of the court of last resort in this State, not only upon all the questions of law in the case under consideration, but upon the identical title under which the plaintiff in the reported case, and the defendant in the present case, claimed to own the premises in controversy in the respective suits. \* \* \* In such a case, there being no pretense of collusion, and no reason to impute carelessness or inattention to the judges, the determination should be considered final and conclusive upon all persons in interest, or who may become interested in the question, as well as upon the parties to the particular action. *Towle v. Farley*, 14 N. Y. R. 426; S. C., 4 Duer, 164; *Clarke v. Davenport*, 1 Bosw.

\*R. 96. S. C. affirmed on appeal; and the question is [\* 433] now presented to this court, whether they should adhere to their own opinion as expressed in the cases in 8th Howard, or acknowledge the authority of the courts of New York to settle finally the contest upon this title.

The subject of the dispute is real property situated within the State of New York, and her laws exclusively govern in respect to the rights of the parties, the modes of the transfer, and the solemnities which should accompany them. *Communis et recta sententia est, in rebus immobilibus servandum esse jus loci in quo bona sunt sita.* Every sovereign has the exclusive right to command within his territory; and the laws which originate rights to real property are commands addressed to the members of the State, requiring them to abstain from any interference with the proprietary right they recognize or establish; and in respect to this subject the sovereignty of New York has not been impaired by her adoption of the federal constitution. The power to establish federal courts, and to endow them with a jurisdiction to determine controversies between certain parties, affords no pretext for abrogating any established law of property, or for removing any obligation of her citizens to submit to the rule of the local sovereign. The title of the devisees

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of Mary Clarke was divested by authority conferred by the legislature of the State, which was exercised subject to the oversight of her own tribunals. The persons affected by this authority were natives of the State—children under the superintending care of the paternal jurisdiction of the State. It was in the constitutional exercise of this supreme and exclusive jurisdiction that this title was disturbed. It behooves every other State to enforce or maintain rights which have thus originated in laws operating within their legitimate sphere, and which defeat no policy of their own; and the jurisprudence of this court attests the care with which this court has observed the general obligation, (of which this is a particular instance,) in its administration throughout the Union.

In *Jackson v. Chew*, 12 Wheat. 162, this court say:

“The inquiry is very much narrowed by applying the rule which has uniformly governed this court, that where any principle of law establishing a rule of real property has been settled in the State courts, the same rule will be applied by this court that would be applied by the State tribunals.”

In *Beauregard v. New Orleans*, 18 How. 497, the court say:

The judgments of the supreme court of Louisiana, upon the validity of the sales impugned in this bill, were given more than twenty years ago. They have formed the foundation upon which the expectations and conduct of the inhabitants of that State have been regulated. They have quieted apprehension and doubt respecting a title to an important portion of a large and growing city. They have invited a multitude of transactions and engagements in which the well-being of hundreds, perhaps thousands, of the citizens of that State depend. In this bill there are several hundred of defendants. The constitution of this court requires it to follow the laws of the several States wherever they properly apply; and the habit of the court has been to defer to the decisions of their judicial tribunals upon questions arising out of the common law of the State, especially when applied to the title to lands. Upon cases like the present, the relation of the courts of the United States to a State is the same as that of her own tribunals. They administer the laws of the State, and to fulfill that duty they must find them as they exist in the habits of the people, and in the exposition of their constituted authorities. Without this, the peculiar organization of the judicial tribunals of the States and the Union would be productive of the greatest mischief and confusion.”

In the case of *Arguello v. United States*, 18 How. 539, this court determined that the colonization regulations of Mexico, of 1824 and 1828, did not prohibit the settlement of the littoral or coast

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leagues by natives, under the authority of the governor of California, and without the consent of the central government in Mexico. The same question was presented in the case of *League v. Smith*, at this term, from the district court of the United States in Texas, in reference to the coast leagues in that State. This court found a contrary opinion had prevailed in the courts of that State, and had become a \*rule of property there, and without [ \* 435 ] re-examining their own opinion, or making any attempt to account for or to reconcile the difference, without any hesitation applied the rule adopted in Texas to the determination of controversies existing there.

The cases reported in the 8th Howard, referred to, came before this court upon a division of opinion between the experienced judges of the circuit court of the southern district of New York. The authority of *Clarke v. Van Surley* was thus impugned in that tribunal. The decision in the court of errors was far from being unanimous; nor was the dissent in that tribunal feeble or equivocal.

The majority of this court were convinced that the questions might be examined anew, and their answers were accordant with the opinion of the minority in the court of errors.\* But in the present case there is no room for doubt as to what the settled opinion of the courts of New York is in reference to this title, and therefore no occasion for any hesitation concerning the obligation we have to perform. The circuit court decided adversely to the defendant. Its judgment is reversed, and the cause remanded for further proceedings.

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JACOB E. CURTIS, Plaintiff in Error, v. THE COUNTY OF BUTLER.

24 H. 435.

MUNICIPAL BONDS.

1. The act of the Pennsylvania legislature of February 9, 1853, authorized the commissioners of Butler county to issue negotiable coupon bonds in payment for subscription of stock to the Northwestern Railroad Company.
2. This authority was well executed by the signatures of two out of the three commissioners to the bonds.

THIS case comes here upon a certificate of division of opinion on points stated in the case between the judges of the circuit court for the western district of Pennsylvania. The case is stated in the opinion.

*Mr. Stanton*, for the plaintiff.

*Mr. Black*, for the defendants.

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[ \* 445 ] \*Mr. Justice WAYNE delivered the opinion of the court.

This case has been sent to us upon a certificate of division upon two points, which occurred between the judges upon the trial of it in the court below: 1. Had the commissioners of Butler county legal authority to issue the bonds given in evidence? 2. If they had, was such power or authority well exercised by two out of the three commissioners of the said county, or were the bonds signed by two of them binding?

The act under which the bonds were issued was passed 9th February, 1853. The first section enumerates the persons by name who were to become commissioners to open books, receive subscriptions of stock, and to organize a company by the name, style, and title of the Northwestern Railroad Company, with all the powers, and subject to all the duties, restrictions, and regulations, prescribed by an act regulating railroad companies, approved the 19th of February, 1849, "so far as the same are not allowed and supplied by the provisions of this act."

By the second section of the act, the capital stock of the company was to be divided into twenty thousand shares, of fifty dollars each, with the privilege to be increased, if the exigencies of the company shall require it, to any sum not exceeding two millions of dollars, as the president and directors of said company may deem expedient. By the third section, the company have the right to build and construct a railroad from some point on the Pennsylvania or Allegheny railroad, at or west of Johnstown, by the way of Butler, to the Pennsylvania and Ohio State line, at some point on the western boundary line of Lawrence county, &c., &c., to connect with any railroad now or which might be thereafter constructed at either end, or at any intermediate point on the line or route thereof. For doing this, the company was authorized to borrow money to an amount not exceeding the capital stock of the company, upon bonds to be issued by it whenever the president and directors might deem it expedient to do so. The rate of interest upon the bonds was not to exceed seven per cent., and they were to be convertible into

the stock of the company, whenever the holders of it and  
[ \* 446 ] the \*company might agree to have that done. The sixth section of the act we need not speak of, as it relates to matters unconnected with the questions certified, or from which there is not any impeachment of the correct action of the company.

By the seventh section, the counties through parts of which the railroad may pass were authorized to subscribe to the capital stock of the company, "and to make payments on such terms and in such manner as may be agreed upon by the company and proper county."

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But the amount of the subscription of any county was not allowed to exceed ten per centum of the assessed valuation thereof, (for taxes,) and before any subscription could be made for any county, the amount of each was to be determined and approved by a grand jury of the county. Upon the report of a grand jury being filed, the county commissioners were to carry it into effect, accordingly. Then, whenever bonds of the respective counties were given in payment of subscriptions, the commissioners were prohibited from selling them at less than at par; and such bonds the State exempted from taxation until the clear profit on the business of the railroad amounted to six per cent. on the cost thereof; and it was declared that the subscription of the counties was to be held to be valid when made by a *majority* of its commissioners. With this analysis of the act, under which the bonds sued upon were issued, we proceed to consider the points submitted to us.

In the first place, after a careful examination of the act to which this act was made subordinate, we do not find that anything was done by the commissioners inconsistent with it, or bearing upon the points certified.

We think that the county commissioners had authority from the legislature to execute the bonds, and to pledge the faith, credit, and property of the county, to pay them. Authority was given by the seventh section of the charter. It declares that the county shall have power to subscribe to the capital stock of the railroad company, and to make payment in such manner and upon such terms as may be agreed upon between the county and the company.

It cannot be denied that this was an authority to the county \* to make a contract of subscription, and that it [\* 447] contemplates a payment for it prospectively "by bonds which, when made in the name of any county, were to be held valid, if made by a majority of the commissioners of the respective counties." The power to subscribe, the manner of payment, the limitation upon the amount of subscription, the mode of carrying that out through the intervention of a grand jury's approval and report, the allowance of bonds to be given in payment, the restriction of the same upon the railroad company to which they were to be transferred, not to sell the bonds at less than par, the hindrance upon the issue of bonds of less than one hundred dollars, the exemption of them from taxation upon a contingency until the clear profits of the railroad shall amount to six per cent. upon the cost of it, are significant of what was intended. All of those particulars in this section of the statute are to be considered together in the construction of it.

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No one questions that the legislature, then, had the power to incorporate such companies, and to allow the counties of the State to become interested in them upon the faith of county securities, for the transportation of persons and things in all of the vehicles used for commerce and the carrying trade, either by water, or by land upon ordinary artificial roads. And that associations of persons might be incorporated for the construction of the latter, either by money already subscribed, or by money to be raised or borrowed by certificates of indebtedness, with certificates of interest attached, separable from the former, for the payment of interest, payable at particular times.

The objection now, as we understand it, is not that the legislature had not such a power. But it is said, in the exercise of it, that the railroad company, and the counties through which the road might be constructed, had mistaken the terms upon which the counties might subscribe to the capital of the railroad company, as to the manner for the payment of the subscription; in other words, that the counties in issuing bonds with coupons had mistaken the special authority given to them by the seventh section of the act, and had made a different contract, which could not be judicially enforced.

[ \* 448 ]     \* That section is as follows: "That the counties through parts of which said railroad may pass shall be authorized to subscribe to the capital stock of the railroad company, and to make payment on such terms and in such manner as may be agreed upon by said company and the proper county: provided, that the amount of subscription by said county shall not exceed ten per cent. of the assessed valuation thereof, and that before any such subscription shall be made, the amount thereof shall be fixed and determined by one grand jury of the proper county, and approved by the same; and that upon the report of such grand jury being filed, the county commissioners may carry the same into effect *by making in the name of the county* the subscription directed by the grand jury: provided, that whenever the bonds of the respective counties are given in payment of subscriptions, the same shall not be sold by the railroad company at less than par value, and no bonds shall be in less amount than one hundred dollars, and that such bonds shall not be subject to taxation until the clear profits of said railroad company shall amount to six per cent. upon the cost thereof; and that all subscriptions made or to be made in the name of any county shall be held and deemed valid if made by a *majority* of the commissioners of the respective counties."

Now, we freely subscribe to the rule that neither privileges, pow-

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ers, nor authorities, can pass by an act of incorporation, unless they be given in unambiguous words, and that an act giving special privileges must be construed strictly. That in such a case, where a sentence is capable of having two distinct meanings, a construction must be given to it most favorable to the public. But in applying these principles to this case, it must be done with reference to the subject-matter contemplated by the legislature as a whole, and not allow its manifested intention and design to be defeated by denying to the counties the only means of paying their subscription, by which the main object could be accomplished.

Why was it that the legislature, in drawing the section, directed that the subscriptions of the counties should be made upon terms and in manner as the railroad and the counties \* might agree upon; that it limited the amount of sub- [\* 449] scription upon an assessed valuation of the property of the county; that it contemplated a taxation contingently upon the bonds of the counties, respectively, that they were to be given in payment of subscriptions, unless it had been its clear intention that the subscriptions were to be paid for by county bonds, when both company and county should make such a contract?

This, in our view, is not a case of ambiguity in the power given, but one of as clear designation as could have been expressed. Nor was it a case in which the legislature imposed a public burden. It was no more than giving to the people of the county a right to tax themselves for an anticipated advantage to arise from an expenditure of their own money in the construction of a railroad. It was the concern of the county; the same as it would have been if the county had been legislatively empowered to tax themselves to clear out a river for a better navigation, or for the cutting of a canal. Whether the allowance for the issue of bonds for either of those purposes will be judicious depends upon the subject and the regulations which the legislature may impose for their execution.

In our best judgment, applied as it has been to the 7th section of the act to incorporate the Northwestern Railroad Company, in connection with a full consideration of the rules for the construction of the powers of corporations, we have been unable to find anything in the 7th section equivocal or doubtful as to the power given to the counties to make and to pay for their subscriptions to the railroad company, and nothing wrong as to that company having received them according to its charter.

We therefore answer to the first point certified to this court, "that power was given in the act of the 9th February, 1853, and by the agreement of subscription and terms of payment, to the

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commissioners of Butler county, to make the instruments upon which the suit is brought, and to bind the county to pay them."

We will now proceed to the second point certified to this court:

and if any power was given to issue bonds payable to [ \* 450 ] \* bearer, with coupons attached, it could not be exercised by two out of the three commissioners of the said county; and that these bonds having been signed by but two of the said commissioners, are not binding on the county.

We have examined the acts relating to who are designated to exercise the corporate powers of the county. By the act of the 15th April, 1834, the commissioners are to do so; and it is now claimed, as there are three, that all of them should have signed the bonds to make them binding upon the county. But by the 19th section of the act, it is declared that two of the commissioners shall form a board for the transaction of business, and when convened in pursuance of notice or according to adjournment, shall be competent to perform all and singular the duties appertaining to the office of county commissioners. Purdon's Digest, 176.

Before the act of 1834 was passed, it was held in the case of the commissioners of Allegheny county against Lecky, 6 S. and R. page 166, that all powers conferred upon the commissioners might be legally executed by two, without the concurrence of the third. The same ruling will be found in *Cooper and Grove v. Lampter Reansbey*, 8 Watts, 128; 5 Binney's Reports, 481. But why cite authorities, when the act in terms makes the bonds valid if made by a *majority of the commissioners* of the respective counties.

We therefore answer the second point certified, that the bonds upon which suit is brought, being signed by two out of the three commissioners, are binding upon the county of Butler.

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WATSON FREEMAN, Marshal of the United States, Plaintiff in Error,  
v. JABEZ C. HOWE and others.

24 H. 450.

CONFLICT OF JURISDICTION BETWEEN FEDERAL AND STATE COURTS.

1. Where an officer of a federal court seizes personal property under the writ of that court, the property is in the custody of the court, and cannot be lawfully seized or taken from his possession by the process of any other court.
2. Hence, where a United States marshal had possession of property by virtue of a writ of attachment, it cannot be taken from his possession by a writ of replevin issued from the State court.
3. Nor does the fact that the replevin suit was brought by one not a party to the first



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suit, on the ground that his property was seized for the debt of another person, lead to a different result.

4. The case of *Taylor v. Carryl*, 20 How. 583, (2 Miller, 616,) did not rest, as is now argued, upon anything peculiar to the jurisdiction of admiralty courts, but upon the broad proposition that, by a principle of comity, no court can take from another of concurrent jurisdiction property in its possession or control. See *Buck v. Colbath*, 3 Wall. 334.
5. Where property of A is wrongfully seized under a writ of attachment against B, as is asserted in this case, the proper mode of relief in the federal courts is by a petition of the rightful owner for its release. Such a petition will be heard and relief granted without regard to the citizenship of the parties.

WRIT of error to the supreme judicial court of Massachusetts.  
The case is fully stated in the opinion.

*Mr. Parker*, for plaintiff.

*Mr. Hutchins*, for defendants.

\*Mr. Justice NELSON delivered the opinion of the court. [\* 453 ]

This is a writ of error to the supreme court of Massachusetts.

The case was this: Selden F. White, of the State of New Hampshire, in 1856 instituted a suit in the circuit court of the United States for the district of Massachusetts, against the Vermont and Massachusetts Railroad Company, a corporation under the laws of Massachusetts, to recover certain demands claimed against the defendants. The suit was commenced in the usual way, by process of attachment and summons. Freeman, the marshal, and plaintiff in error, to whom the processes were delivered, attached a number of railroad cars, which, according to the practice of the court, were seized and held as a security for the satisfaction of the demand in suit in case a judgment was recovered. After the seizure, and while the cars were in the custody of the marshal, they were taken out of his possession by the sheriff of the county of Middlesex, under a writ of replevin in favor of Howe and others, the defendants in error, issued from a State court. The plaintiffs in the replevin suit were mortgagees of the Vermont and Massachusetts Railroad Company, including the cars in question, in trust for the bondholders, to secure the payment of a large sum of money which remained due and unpaid.

The defendant, Freeman, in the replevin suit, set up, by way of defense, the authority by which he held the property under the circuit court of the United States, which was overruled by the court below, and judgment rendered for the plaintiffs. The case is now before us on a writ of error.

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I. The suit in this case has been instituted and carried [ \* 454 ] on \* to judgment in the court below under a misapprehension of the settled course of decision in this court, in respect to the case of conflicting processes and authorities between the federal and State courts; and also in respect to the appropriate remedy of the plaintiffs for the grievances complained of.

As it respects the effect to be given to the processes of the courts, whether State or federal, the subject was so fully and satisfactorily examined in the case of *Taylor et al. v. Carryl*, the last of the series on the subject, we need only refer to it, as all the previous cases will there be found. 20 How. R. 583.

The main point there decided was, that the property seized by the sheriff, under the process of attachment from the State court, and while in the custody of the officer, could not be seized or taken from him by a process from the district court of the United States, and that the attempt to seize it by the marshal, by a notice or otherwise, was a nullity, and gave the court no jurisdiction over it, inasmuch as, to give jurisdiction to the district court in a proceeding *in rem*, there must be a valid seizure and an actual control of the *res* under the process.

In order to avoid the effect of this case, it has been assumed that the question was not one of conflict between the State and federal authorities, but a question merely upon the relative powers of a court of admiralty and a court of common law in the case of an admitted maritime lien. But no such question was discussed by Mr. Justice CAMPBELL, who delivered the opinion of the majority of the court, except to show that the process of the district court in admiralty was entitled to no precedence over the process of any other court, dealing with property that was, in common, subject to the jurisdiction of each. On the contrary, he observed, at the close of the opinion, that the view taken of the case rendered it unnecessary "to consider any question relative to the respective liens of the attaching creditors, and of the seamen for wages, or as to the effect of the sale of the property as chargeable, or as perishable, upon them."

The minority of the court took a different view of the question supposed to be involved in the case. It is succinctly [ \* 455 ] \*stated by the chief justice, at the commencement of his dissenting opinion. He observes: "The opinion of the court treats this controversy as a conflict between the jurisdiction and rights of a State court and the jurisdiction and rights of a court of the United States, as a conflict between sovereignties, both acting by their own officers within the sphere of their acknowledged

powers. In my judgment, this is a mistaken view of the question presented by the record. It is not a question between the relative powers of a State and the United States, acting through their judicial tribunals, but merely upon the relative powers and duties of a court of admiralty and a court of common law in a case of an admitted maritime lien ;” and hence the conclusion was arrived at, that the power of the admiralty was paramount. The majority of the court were of opinion that, according to the course of decision in the case of conflicting authorities under a State and federal process, and in order to avoid unseemly collision between them, the question as to which authority should, for the time, prevail, did not depend upon the rights of the respective parties to the property seized, whether the one was paramount to the other, but upon the question, which jurisdiction had first attached by the seizure and custody of the property under its process.

Another distinction is attempted by the defendants in error. It is admitted that in the case of a proceeding *in rem*, the property seized and in the custody of the officer is protected from any interference by State process. But it is claimed that the process of attachment issued by a common-law court stands upon a different footing, and the reasons assigned for the distinction are, that in the one case the property seized is the subject of legal inquiry in the court, the matter to be tried and adjudicated upon, and which, in the language of the counsel, lies at the foundation of the jurisdiction of the court; but that, in the other, the property seized, namely, under the attachment, is not the subject-matter to be tried, like the property which is the subject of a libel *in rem*, as the process is, simply, for the recovery of a debt, without any lien or charge upon the property, except that resulting from the \*attachment to secure the debt, and that the question of [ \* 456 ] lien upon the property is a collateral one, which the federal court could not hear and decide in the action before it; and further, that the question of liability of the railroad company was upon certain bonds, the trial and judgment upon which would not be affected by the possession or want of possession of the property seized by the marshal.

The idea which seems to prevail in the mind of the learned counsel on the part of the defendant in error is, that there is something peculiar and extraordinary in a proceeding *in rem* in admiralty, and in the lien upon which it is founded, that invests them with a power far above the proceedings or liens at common law, or by statute; and that while the seizure of the property in

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tion of the subject-matter, then the inquiry into the validity of the seizure belongs exclusively to the federal courts. But if there be no jurisdiction in the instance in which it is asserted, as if a marshal of the United States, under an execution in favor of the United States against A, should seize the person or property of [ \* 459 ] B, then the \* State courts have jurisdiction to protect the person and the property so illegally invaded."

The error into which the learned chancellor fell, from not being practically familiar with the jurisdiction of the federal courts, arose from not appreciating, for the moment, the effect of transferring from the jurisdiction of the federal court to that of the State the decision of the question in the example given; for it is quite clear, upon the principle stated, the jurisdiction of the former, and the validity and effect of its process, would not be what the federal, but State court, might determine. No doubt, if the federal court had no jurisdiction of the case, the process would be invalid, and the seizure of the property illegal, for which the aggrieved party is entitled to his remedy. But the question is, which tribunal, the federal or State, possesses the power to determine the question of jurisdiction or validity of the process? The effect of the principle stated by the chancellor, if admitted, would be most deep and extensive in its operation upon the jurisdiction of the federal court, as a moment's consideration will show. It would draw after it into the State courts, not only all questions of the liability of property seized upon mesne and final process issued under the authority of the federal courts, including the admiralty, for this court can be no exception, for the purposes for which it was seized, but also the arrests upon mesne, and imprisonment upon final process of the person in both civil and criminal cases, for in every case the question of jurisdiction could be made; and until the power was assumed by the State court, and the question of jurisdiction of the federal court was heard and determined by it, it could not be known whether in the given case it existed or not. We need scarcely remark, that no government could maintain the administration or execution of its laws, civil or criminal, if the jurisdiction of its judicial tribunals were subject to the determination of another. But we shall not pursue this branch of the case further. We regard the question as settled, at least as early as 5 Cranch, 115, *United States v. Peters*, familiarly known as the *Olmstead case*, and which is historical, that it belongs to the federal [ \* 460 ] courts to determine the question of their own \*jurisdiction, the ultimate arbiter, the supreme judicial tribunal of the nation, and which has been recently reaffirmed, after the most

careful and deliberate consideration, in the opinion of the present chief justice, in the case of the *United States v. Booth*, (21 How. 506.)

II. Another misapprehension under which the counsel for the defendant in error labors, and in which the court below fell, was in respect to the appropriate remedy of the plaintiffs in the replevin suit for the grievance complained of. It was supposed that they were utterly remediless in the federal courts, inasmuch as both parties were citizens of Massachusetts. But those familiar with the practice of the federal courts have found no difficulty in applying a remedy, and one much more effectual than the replevin, and more consistent with the order and harmony of judicial proceedings, as may be seen by reference to the following cases: 23 How. 117, *Pennock et al. v. Coe*; *Robert Gue v. The Tide Water Canal Company*, decided this term; 12 Peters, 164; 8 Ib., 1; 5 Cranch, 288.

The principle is, that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties.

The case in the 8 Peters, 1, which was among the first that came before the court, deserves, perhaps, a word of explanation. It would seem from a remark in the opinion, that the power of the court upon the bill was limited to a case between the parties to the original suit. This was probably not intended, as any party may file the bill whose interests are affected by the suit at law.

In the case of *Pennock v. Coe* the bill was filed by the mortgagee of the railroad company, in trust for the bondholders, answering to the position of the plaintiffs in the replevin suit in the case before us. *Gue v. The Tide Water Canal Company*, decided at this term, is an instructive case upon this \*sub- [\*461] ject, in which the chief justice suggests the difficulties of a court of law dealing with this description of property with a proper regard to the rights of all concerned.

In that case the bill was filed on the equity side of the circuit court of the United States for the district of Maryland, to restrain a sale of the defendant's property on execution. *Gue*, the judgment creditor, was a resident of Pennsylvania.

We shall not look into the questions raised upon the mortgage, whether executed by the proper authority, or if it was, whether it

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covered after-acquired property, as not material to the case before us. The latter question was fully examined in this court in the case above referred to, of *Pennock v. Coe*.

Neither shall we inquire into the questions raised under the attachment laws of Massachusetts, as they are unimportant in our view of the case.

Upon the whole, after the fullest consideration of the case, and utmost respect for the learning and ability of the court below, we are constrained to differ from it, and reverse the judgment.

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THACKER B. HOWARD, Plaintiff in Error, v. FRANCIS BUGBEE.

24 H. 461.

CONSTITUTIONAL LAW. STATUTES IMPAIRING OBLIGATION OF CONTRACTS.

A State statute which allows a judgment creditor of a mortgager to redeem the land within two years after a sale under a decree of foreclosure of the mortgage is a statute impairing the obligation of the contract of mortgages, as to all such mortgages as were in existence when the statute was enacted. See 1 How. 311, (14 Curtis, 628;) 2 How. 612, (15 Curtis, 228;) 3 How. 707, (15 Curtis, 608.)

WRIT of error to the supreme court of Alabama. The case is stated in the opinion.

*Mr. Phillips*, for plaintiff.

*Mr. Clay*, for defendant

[ \* 464 ] \* Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the supreme court of the State of Alabama.

The case was this :

Enoch Parsons executed a mortgage of the premises in controversy, on the 9th December, 1836, to Sarah Tait, to secure the payment of \$13,246.66. The last installment fell due in January, 1841. In March, 1846, proceedings were instituted in the court of chancery to foreclose the mortgage for default in payment; and in September, 1848, Howard, the appellant, became the purchaser of the premises, under the decree of foreclosure, and held a deed of the same duly executed by the proper officer.

In January, 1842, the legislature of the State of Alabama passed an act authorizing a judgment creditor of the mortgager, of his estate, at any time within two years after the sale under a mortgage, to redeem the land from the purchase on paying the purchase money, with a certain per cent. interest, besides charges.

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Bugbee, the appellee, and plaintiff in the court below, having recovered a judgment against the estate of Parsons in 1843, tendered within the two years the purchase money, interest, and charges, to Howard, and also a deed of the premises to be executed; all of which were refused. This bill was filed in the court of chancery in Alabama by Bugbee to compel Howard to receive the money in redemption of the sale and execute the deed.

The main ground of the defense in that suit was, that the mortgage from Parsons, under which the defendant derived title, having been executed before the passage of the act providing for the redemption, the act as respected this debt was inoperative and void, as impairing the obligation of the contract.

The court of chancery so held and dismissed the bill. But on appeal to the supreme court, that court reversed the decree below, and entered a decree for the complainant. The case is now here on a writ of error to the supreme court.

The only question involved in this case was decided in *\*Bronson v. Kinzie*, 1 How. 311. It was there held, after [ \* 465 ] a very careful and extended examination by the court, through the chief justice, that the State law impaired the obligation of the mortgage contract, and was forbidden by the constitution. This decision has since been repeatedly affirmed. 2 How. 612; 3 Ib. 716.

It is due to the judges of the court below to say that they felt bound by a decision of their predecessors, which they admitted to be in direct conflict with the case of *Bronson v. Kinzie*, and that the two decisions could not be reconciled.

We are entirely satisfied with the soundness of the decision in the above case, and with the grounds and reasons upon which it is placed, and shall simply refer to them as governing the present case.

Decree below reversed. Case remitted with directions to enter decree for the plaintiff in error.

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CHARLES McM. PERRIN and others, Appellants, v. FREEMAN G. CAREY and others.

24 H. 465.

EQUITY—CHARITABLE BEQUESTS—STATUTES OF OHIO.

1. The statutes of mortmain and the limitations of grants in perpetuity in England did not permit valid grants to corporations for charitable uses which were practically inalienable.

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2. Nor is there anything in the statutes of Ohio which forbids such gifts and bequests; and though the act of 43 Elizabeth, chap. 4, is not in force in Ohio, the court of chancery has jurisdiction of charitable bequests, as the court had in England independently of that statute.
3. The city of Cincinnati, as a corporation, had the capacity to receive a bequest, for the purpose of establishing colleges for boys and girls, and administering the trust.
4. These devises are charities in a legal sense, and may be enforced in a court of equity without the aid of legislation by the State of Ohio.
5. There is no uncertainty in the will of McMicken as to who shall be the beneficiaries of this charity: and his selection of his relatives, as entitled to preference in the colleges, was a valid exercise of his right in making the bequest.

APPEAL from the circuit court for the southern district of Ohio. The case is fully stated in the opinion.

*Mr. Headington* and *Mr. Ewing*, for appellants.

*Mr. Pugh*, *Mr. Taft*, and *Mr. Perry*, for appellees.

[ \* 491 ]      \* Mr. Justice WAYNE delivered the opinion of the court.  
The appellants here were the complainants in the court below.

The object of their bill is to set aside the devises and bequests in the will of Charles McMicken to the city of Cincinnati, in trust for the foundation and maintenance of two colleges.

The testator says: "Having long cherished the desire to found an institution where white boys and girls may be taught, not only a knowledge of their duty to their Creator and their fellow men, but also receive the benefit of a sound, thorough, and practical English education, and such as might fit them for the active duties of life, as well as instruction in all the higher branches of knowledge, except denominational theology, to the extent that the same are now or may be hereafter taught in any of the secular

[ \* 492 ] colleges or universities \* of the highest grade in the country, I feel grateful to God that through his kind providence I have been sufficiently favored to gratify the wish of my heart. I therefore give, devise, and bequeath to the city of Cincinnati, and its successors, for the purpose of building, establishing, and maintaining, as far as practicable, after my decease, two colleges for the education of boys and girls, all the following real and personal estate, in trust forever, to wit:" describing the property in nine clauses of the thirty-first article of the will.

He then proceeds to declare that none of the real estate devised, whether improved or otherwise, or which the city may purchase for the benefit of the colleges, should at any time be sold, but that the buildings upon any part of it should be kept in repair out of the revenues of his estate. In the event, however, of dilapidation, fire,



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or other cause, or if it shall be deemed expedient to have a larger income, he directs houses to be taken down, and that they are to be rebuilt out of the income of his estate. He further authorizes purchases to be made of other property, buildings to be put up on his vacant lots, and designates a part of the eastern boundary of the grounds devoted to the college for the boys for the erection of boarding houses for the accommodation of the students, from which a revenue may be derived. The testator then declares where the colleges shall be located, that there might be a separation between that for the boys and that for the girls. There are other particulars under this article of the will which we need not recite, as they have no bearing upon the controversy made by the bill. Passing over the 33d article of the will for the same reason, the next article in the will is a direction that the Holy Bible of the Protestant version, as contained in the Old and New Testaments, shall be used as a book of instruction in the colleges. Next, it is declared that in all applications for admission to the colleges, preference should be given "to any and all of the testator's relations and descendants, to all and any of his legatees and their descendants, and to Max McMicken and his descendants." Then he directs: "If, after the organization and establishment of the institution," and the admission of as many pupils as in the discretion of \* the city have been received, there shall remain a *sufficient* [ \* 493 ] *surplus of funds*, that the same shall be applied to making additional buildings, and to the support of poor white male and female orphans, neither of whose parents are living, &c., &c., preference to be given to my relations and collateral descendants, &c., &c.; that they were to receive a sound English education, &c., &c.; and afterwards, directions are given as to the mode of receiving such poor white male and female orphans, and the privileges to be allowed under certain circumstances. The testator, in the thirty-fourth article of his will, declares that "the establishment of the regulations *necessary to carry out the objects of my endowment I leave to the wisdom and discretion of the corporate authorities of the city of Cincinnati, who shall have power to appoint directors to said institution.*" The last article of the will relates to the devises and bequests to the city, and directions as to paying the accounts of the trust. The testator then nominates executors, and they are the appellees in this appeal.

This statement has been made, that the devises and bequests of the testator may be fully disclosed, and the merit of them as a charitable use may be fully understood.

Our first observation is, that it was his intention to establish pri-

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marily two colleges for boys and girls, and then a third for the support of poor white male and female orphans, neither of whose parents were living, and who were without any means of support, who were to receive a sound English education. This third school was to be founded by applying to the purpose the surplus funds which might remain after the complete organization of the colleges. (36th article of the will.) The testator anticipated that there would be such a surplus, as he left it in the discretion of the city to determine the number of the pupils who were to be admitted to the colleges. We must then keep in mind the thirty-first and thirty-sixth articles of the will in considering it, though they are but contingently connected by the happening of a surplus in the way just mentioned. For, now, if the first is subject to a failure as a gift for charitable purposes, the devises and bequests may be good [ \* 494 ] under the second. Our attention, however, will be chiefly given to the thirty-first section and its clauses, as under that it was principally argued by counsel.

The learned sergeant, Sir Francis Moore, who drew the statute of 43 Elizabeth, chapter 4, says, in his exposition of it: "As in all other grants, so in a gift to a charitable use, four things are principally to be considered: 1. The ability of the donor. 2. The capacity of the donee. 3. The instrument or means whereby it is given. 4. The thing itself which is or may be given to a charitable use." And then, by way of caution to donors, he says: "There are five things which cannot be granted to such a use: 1. Things that yield no profit. 2. Things that are incident to others, and inseparable. 3. Possibilities of interest. 4. Conditions—meaning that such things are from their nature insusceptible of serving such a purpose;" and then he adds the 5th: "Copyholds, if in any way prejudicial to the lord." We shall not consider them numerically, but both seem to be the natural way to discuss such a gift, when its validity is disputed. We shall follow it in those particulars as briefly as we can.

No question is made, however, in this case, as to the execution of the will, nor as to the capacity of the devisor. It is insisted, though, that the devises and bequests to the donee, the city of Cincinnati, are void, because the city has not the capacity to take them, and also that they create a perpetuity from being inalienable, which is contrary to law.

Charity, in a legal sense, is rather a matter of description than of definition; and the word perpetuity in law is only determined by the circumstances of such cases. But for the purposes of this case, the objection to the validity of the charity on account of its

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perpetuity, we will place under Mr. Sander's definition in his Essay upon Uses and Trusts, 196: "A perpetuity may be defined to be a future limitation, restraining the owner of the estate from aliening the fee of the property, discharged of such future use or estate, before the event is determined or the period is arrived when such future use or estate is to arise. If that event or period be within the bounds prescribed by law, it is not a perpetuity." It is then a limitation upon the *jus disponendi* of property, upon the common-law \*right of every man to dispose of his [ \* 495 ] land "to any other private man at his own discretion."

And one class of those limitations is technically termed alienation in mortmain, and to charitable uses. Alienation in mortmain, in its primary signification, is an alienation of lands or tenements to any corporation, aggregate, ecclesiastical, or temporal, the consequence of which in former times was, that by allowing lands to become vested in objects endued with perpetuity of duration, the lords were deprived of escheats and other feudal profits, and the *general policy of the common law, which favored the free circulation of property, was frustrated, although it is true that at the common law the power of purchasing lands was incident to every corporation.* The effect of these statutes deprived every corporation in England, spiritual or secular, from acquiring, either by purchase or gift, real property of any description, without a general license from the crown enabling it to hold lands in mortmain, or a special license in reference to any particular acquisition. These restraints were subsequently relaxed in many particulars, including gifts to a corporation for purposes of education. But this case does not require us to particularize them; our only purpose for having alluded to statutes of mortmain being to show, from the view taken of them from an early day by the courts in England, that devises to corporations, which generally cannot take lands under a will, were held good when made in favor of charities, and that such gifts, from the purposes to which they were to be applied, and the ownership to which they are subjected, have had the protection of courts of equity to prevent any alienation of them on the part of the person or body interested with the offices of giving them effect; and that in all such cases land has been decreed by courts of equity to be practically inalienable, or that a perpetuity of them exists in corporations when they are charitable gifts. *Hillam's case*, Duke, 80, 375; *Mayor of Bristol v. Whitton*, 1633, Duke, 81, 377; *Mayor of Reading v. Lane*, 1601, Duke, 81, 361; *Lewis on Perpetuity*, 684; 1 *Macnaghten and S. Gordon*, 460; *Chart. Hospital v. Granger*; *Griffin v. Graham*, 1 Hawks, 130; *State v. Girard*, 2 Ired. Eq. R.

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210. The objection that the devises and bequests create a [ \* 496 ] perpetuity cannot be maintained \* unless they are forbidden by the law of Ohio. And if a perpetuity was forbidden, the charitable trust would not fail, but would be held good and carried out in equity.

We were told that the first and second sections of the 13th article of the constitution, in connection with the legislation of the State under them, prevent an estate in perpetuity from being made in Ohio. And for showing the bearing of them upon this case, we were referred to an act of Ohio to restrain the entailment of real estates. 2 Swan, secs. 355-6.

We are unable to see any fair connection between them. The first and second sections of the 13th article of the constitution were, that the general assembly shall pass no special act conferring corporate powers. Sec. 2. Corporations may be formed under general laws, but all such may from time to time *be altered or repealed*—that is, though they may be formed under general laws, that the legislature may alter or repeal them. That by the provision they meant to retain their legislative powers to give larger powers than a corporation might have had, to reform them in any particular that might become necessary, that of the violation of a contract excepted. The act to restrict the entailment of real estates obviously applies to individuals exclusively, and not at all to corporations, and especially to such of them as may take and hold charitable gifts in perpetuity.

The first act passed under the constitution of 1851, relating to corporations, was to enable the trustees of colleges, academies, universities, and other institutions for promoting education, to become bodies corporate. We will give it in its terms, for nothing in the legislation of that State can show more satisfactorily than it does that public spirit there is in harmony with, and fully up to, that of the age upon the subject of education. The language of the 1st section is, that any number of persons, not less than five, desiring to establish a college, university, or other institution for the purpose of promoting education, religion or morality, agriculture and the fine arts, may, by complying with the provisions of the act, become a body corporate and politic, with perpetual succession, and may assume a corporate name, by which they may sue and [ \* 497 ] be sued, plead \* and be impleaded, in all courts of law and equity; may have a corporate seal, and the same alter or break at pleasure; *may hold all kinds of estate, real, personal, and mixed*, which they may acquire by *purchase, donation, devise, or otherwise*, necessary to accomplish the *objects* of the corporation;

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and further, the trustees of any university, college, or academy may hold in trust any property devised, or bequeathed, "*or donated*" to such institution, upon any specific trust consistent with the objects of said corporation; also, when any number of persons shall have procured by subscription, donation, or devise, purchase, or otherwise, the sum of five hundred dollars, for the purpose of establishing an academy, they may become a body corporate, &c., &c., and do all acts and things necessary for the promotion of education and the general interests of such academy. Time and the occasion will not permit us to give more of this liberal and enlightened statute, and of the supplemental acts passed in August, 1852, and March, 1853. 2 Swan, secs. 195, 196.

There is nothing in either of them in any way interfering with the power of *before-existing* corporations, to become the trustees of charitable devises and bequests for education, and to hold them in perpetuity. There is rather a disposition manifested to enlarge and confirm their power to do so, and to give to other corporations under the act certainty and security in the administration of such trusts. The legislature has succeeded in giving to corporations, for the promotion of education, what the learned gentlemen who brought this bill said were the requisites of a corporation: lawful existence; artificial capacity and perpetuity of existence; and, we add, the unquestioned enjoyment of all these privileges, which courts of equity have said for more than two hundred years they were entitled to, in the construction of devises and gifts for charity, and for the administration of them.

It was conceded in the argument, that the trusts in this will fall within the description of public trusts or charitable uses, as recognized in England since the statute of 43 Elizabeth, c. 4, notwithstanding that statute is not in force in Ohio, *and in our opinion, never was, as we shall show presently.*

\* Charities had their origin in the great command, to [\* 498] love thy neighbor as thyself. But when the Emperor Constantine permitted his subjects to bequeath their property to the church, it was soon abused; so much so, that afterwards, when it became too common to give land to religious uses, consistently with the free circulation of property, the supreme authority of every nation in Europe, where christianity prevailed, found it necessary to limit such devises by statutes of mortmain.

In France, by the ancient constitutions of that kingdom, churches, communities, chapters, colleges, convents, &c., were not permitted to acquire or hold immoveable property. Dumoulin sur 1st art.

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51 de la Cou. Paris. This incapacity after a long time was relaxed, and they were allowed to hold by license of the king.

In Spain, the communities mentioned before could neither acquire nor hold property, unless by authority of the sovereign; but in *England, corporations had the capacity to take property by the common law.* Co. Litt. 99. They were rendered incapable of purchasing without the king's license by a succession of statutes from *Magna Charta*, 9 Henry 3, to 9 Geo. 2.

They are known as the statutes of mortmain; that is, as it was the privilege of any one, before such statute restrained it, to leave his property of every kind by testament to whom he pleased, and for such purposes, charitable or otherwise, as he chose; and the will was, in every particular, administered according the testator's intentions, *sometimes by the courts of common law, and at others by a court in chancery*, as may be seen from the cases in Duke and other writers upon charities. The question, then, under such a condition of the law in Ohio, where there was no statute of mortmain, cannot be in this case, whether chancery had such a jurisdiction, or whether Ohio had adopted in whole or in part the common law, but whether Ohio, in the construction of her judicial system, did not mean to give to those courts which were to have equity jurisdiction cognizance of trusts made by wills for charitable uses, as well as of other trusts; and whether the judges in Ohio have not uniformly entertained it upon that principle. We cannot be mistaken in the conclusion that they have done [ \* 499 ] \*so from the cases cited on both sides in the argument of this case, the larger number of which we have verified by examination.

And we are more confirmed in what has just been said, for the English statutes of mortmain were never in England supposed to have been meant to extend to her colonies, and were never in force in those of them in America which became independent States, but by legislative adoption.

First, it will be observed in all commentaries upon those statutes they are termed local or political laws, meant to suppress a public mischief and abuse in England. The statute of 43 Elizabeth is entitled, "An act to redress the misemployment of lands, goods, and stocks of money, heretofore given to charitable uses." The mode and manner for the enforcement of it in any particular did not exist in any one of the English colonies. There was not in either of them a lord keeper or lord chancellor, or any corresponding officer to mature the regulations enjoined by the act for its enforcement. There were not in the colonies any abuses to redress

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for the misemployment of lands, goods, or money heretofore given to charitable uses ; further, there were not then in any one of them those religious institutions which the monarchs of Europe deemed it politic to restrain from holding lands.

The statute, after beginning with a statement of the abuses to be controlled, declares that for the redress of them, it shall be the duty of the lord chancellor or lord keeper of the great seal for the time being, and for the chancellor of the duchy of Lancaster for the time being, to award commissions, &c., into all or any part of the realm, for the purpose of executing the, &c., statute, and the realm or *kingdom of England*, in statutory parlance, as well in the time of Elizabeth as now, "meant the kingdom over which her municipal laws or the common law had jurisdiction, and did not include either Wales, Scotland, or Ireland, or any other part of the king's dominions, except the territory of England only." 1 Blackstone's Commentaries, sec. 4, p. 93, Wendell.

And in the same section, after having enumerated those dominions which had been subjected by statute or otherwise  
 \* to the laws of England, and such as had not been, all [ \* 500 ]  
 being adjacent to England, Blackstone says, our more distant plantations in America or elsewhere are also in some respects subject to English law. But that must be understood with very many and very great restrictions. Such colonies carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony ; such, for instance, as the general rules of inheritance and of protection from personal injuries. Pages 107, 108, marginal. But we are not left to inferences to establish the locality of the operation of the statutes of mortmain to England, and that they never had any force in the colonies. The whole subject in all its generality was ably discussed and decided in the high court of chancery in England some forty years since. In that case, 2 Merivale, 143, the Attorney General v. Stewart, the question being whether the statute of mortmain, 9 Geo. II, extended to the island of Grenada, in the West Indies, it was ruled that it did not, and that none of the English mortmain acts were of force in the colonies.

Without, then, a particular enactment for such purpose, the statute of 43 Elizabeth, c. 4, could never have been in force in Ohio. Nor do we think it to be a point of judicial uncertainty there, for we cannot find a decision in the courts of Ohio directly declaring that it ever was.

The law was adopted in terms from the statute of Virginia by the governor and judges of the territory. 1 Chase, 190. Whatever

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may have been its validity in other respects, it did not comprehend the statute of Elizabeth. For though it was a remedial statute to correct abuses, it was a restraining statute of the common-law right of every man to dispose of his property by will as he pleased. The law taken from Virginia for Ohio made statutes and acts of parliament *in aid* of the common law, which were of a general nature, and not local to that kingdom, of force in Ohio. It was not in aid of the common law, but being restrictive of it, it should have, as to the places assigned for its operation, a strict interpretation.'

But whether we are right or not so, in respect to the law adopted from Virginia, and passed in the territorial legislature [ \* 501 ] \* ture of Ohio, it is certain that in the year 1806 it was repealed; and that since the statute of Elizabeth has had no force in Ohio as a statute, though the judges of that State, without any assumption, have applied its principles to all cases of charitable devises as a part of chancery jurisdiction. It certainly was right in them and a duty to carry out the charitable intentions of a testator by the same principles that his will was executed in every other respect, when the legislature was silent in respect to such devises, or had given no other rule concerning them.

No more was done by them in Ohio than was done in every other State in this Union where the statute of Elizabeth had not been adopted by legislative enactment.

But in justice to the subject we cannot leave it without saying that original chancery jurisdiction over charities existed in England, and was exercised there, before the statute of Elizabeth was passed; also, that it has now become an established principle of American law, that courts of chancery will sustain and protect such a gift, devise, or bequest, or dedication of property to public charitable uses, provided the same is consistent with local laws and public policy, where the object of the gift is a dedication specific and capable of being carried into effect according to the intentions of the donor. In confirmation of this we refer to the cases collected in Angell and Ames upon Corporations, private and aggregate, 6th edition, 182, 177, and from pages 170 to 180, inclusive.

And this court, in *Vidal et al. v. Mayor of Philadelphia et al.*, reviewed its opinion to the contrary of what has just been said in the case of the Baptist Association v. Hart's Executors, and admitted, whatever doubts had been expressed in that opinion, that they had been removed by later and more satisfactory sources of information.

And in *Vidal's* case the court went on to say: It may, therefore, be considered as settled, that chancery has an original and neces-



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sary jurisdiction in respect to devises and bequests in trust to persons competent to take for charitable purposes, when the general object is specific and certain, and not contrary to any positive rule of law. 2 Kent's Comm. 287, 288, \*4 edition; [ \*502 ] Gibson v. McCall, 1 Rich. S. C. 174; Att'y General v. Jolly, *ibid.* 176, N.; Sohun v. Wardens and Trustees of St. Paul's Church, 12 Met. Mass. R. 250; Beall v. Fox, Georgia R. 404; Miller v. Chittenden, 2 Clark, Ia.; and Williams v. William, Opinion by Judge Denio, 4 Selden, 525. We also refer to the opinion of Mr. Justice Baldwin, which led the way upon this question of jurisdiction in the United States in the will of Sarah Zane, in pamphlet, Cir. Co. in Pennsylvania, April term, 1833; and to Mr. Justice Story's Essay in the Appendix to 3 Peter's S. C. R. 481 to 502, inclusive.

The same results have been announced by the decisions in Ohio. The Trustees of the McIntyre Poor School v. The Zanesville Canal and Manufacturing Co., 9 Ohio R. 203, does so. Lane, C. J., avoiding the discussion of the extent of chancery jurisdiction over charities independently of the statute, says: But one of the earliest claims of every social community upon its lawgivers is an adequate protection to its property and institutions, which subserve public uses, or are devoted to its elevation, &c.; and, in a proper case, the courts of one State might be driven into the recognition of some principle analogous to that contained in the statute of Elizabeth as a necessary element of our jurisprudence. But without reference to these considerations, where a trust is clearly defined, and a trustee exists capable of holding the property and executing the trust, it has never been doubted that chancery has jurisdiction over it by its own inherent authority, not derived from the statute, nor resulting from its functions as *parens patriæ*. The same ruling was made afterwards in 15 Ohio R. 593, and in 18 Ohio R. 500, and the main point in both of them could not have been decided without maintaining the jurisdiction in chancery over charitable uses, independently of the statute of Elizabeth. The same may be assumed of the case growing out of the will in 20 Ohio R. 483. Indeed, it was assumed that no case in Ohio of a charitable trust has been judicially maintained, or could have been valid under the universal admission that the statute of the 43 Elizabeth, c. 4, was not in force in Ohio, unless the courts \*there [ \*503 ] had acted from the conviction that in such cases chancery had a jurisdiction over them by its own authority.

We shall now consider the objections which were made by the counsel for the appellants to the validity of the devises and bequests

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of Mr. McMicken, that the city of Cincinnati has not the capacity to take them and to execute the trusts of the will, and that no other trustee can be appointed.

In our view, the answers to them from the opposing counsel were decisive. No incapacity of the city of Cincinnati to take in this instance, can be inferred from its charter. It has the power to acquire, to hold, and possess, real and personal property, &c., &c., and to exercise such other powers and to have such other privileges as are incident to municipal corporations of a like character and degree, not inconsistent with this act or the general laws of the State. Swan, 960. It was admitted in the argument, that the section just read confers power upon the city to acquire and hold real estate for the legitimate objects of the city. These objects are enumerated in many particulars directly connected with its powers to govern the city, and in the nineteen sections following that cited there is not a sentence or word from which an inference can be made that the legislature meant to deprive the city of Cincinnati from taking and administering charitable trusts. Indeed, such a course would have been inconsistent with the legislature's caution in its enactments under the constitution of 1851. It would be doing great injustice to the legislature even to suppose that it meant, in passing an act for the government of corporations, under the provisions of the constitution, that it designed to encroach upon that of the judiciary, or to alter the whole power of chancery in respect to charitable uses, and the long-established practice of corporations, private and municipal, to receive them as trustees, and to administer them according to the intention of donors. So far from any intention to interfere with such a privilege in the city of Cincinnati, we infer from previous and subsequent legislation that it was to have an important agency in carrying out the 6th article of the constitution in respect to education. We allude to the act

[ \* 504 ] for the better organization and classification \* of the common schools in Cincinnati and Dayton, passed in the year 1846, (Ohio Local Laws, 91,) and to that of the 27th January, 1853, both now in force. In the first, the trustees and visitors of common schools in the city of Cincinnati, with the consent of the city council, have the power to establish and maintain out of any funds under the control of the trustees and visitors such other grades of schools than those already established as they may deem expedient for such purpose. Further, by the 68th section of the State school law, Swan, 852, passed in January, 1856, power is given to township boards of education, and their successors in office, to take and hold in trust for the use of central or high schools, or sub-district

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schools, in the township, any grant or donation, or bequests of money, or other personal property, to be applied to the support of such public schools. Again, in Ohio Laws, 33, March 26, 1856, it is declared that whenever any one gives lands or money for the endowment of a school or academy, not previously established, and shall not provide for the management of it, the court of common pleas shall appoint trustees with corporate powers. That act provides also for the management of charities when the founders have not given directions; and another act, Swan, 193, 1856, provides how colleges may be incorporated by their own act, and how trustees of an endowment may also become a corporation by their own act. These acts have been cited to show that Ohio, in her legislation, has made municipal corporations trustees for charity devises and bequests, and that the management of them is a duty. They also prove that the privilege to take them is one given and imposed by law.

After a close examination of all the legislation of Ohio relating to corporations, and its system of education, we have not been able to detect any sentence or word going to show any intent to alter the law as it stood before the adoption of the constitution of 1851, in respect to a corporation receiving and taking, either by testament or donation, property for a charity, or to prevent them from having trustees for the execution of it according to the intention of the donor. To take such privileges from them can only be done by statute expressly, and \*not by any implication [ \* 505 ] by statutes, or from any number of sections in statutes analogous to the subject, containing directions for the management of corporations. The law is, that where the corporation has a legal capacity to take real or personal estate, then it may take and hold it upon trust in the same manner and to the same extent as private persons may do. It is true that if the trust be repugnant or inconsistent with the proper purposes for which it was created, that may furnish a good reason why it may not be compelled to execute it. In such a case, the trust itself being good, will be executed under the authority of a court of equity. Neither is there any positive objection, in point of law, to a corporation taking property upon trust not strictly within the scope of the direct purposes of its institutions, but collateral to them, as for the benefit of a stranger or another corporation. But, if the purposes of the trust be germane to the objects of the corporation, if they relate to matters which will promote and perfect these objects, if they tend to the suppression of vice and immorality, to the advancement of the public health and order, and to the promotion of trade, industry, and happiness,

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where is the law to be found which prohibits the corporation from taking the devise upon such trust in a State where the statutes of mortmain do not exist, the corporation itself having an estate as well by devise as otherwise? We know of no authority which inculcates such a doctrine, or prohibits the execution of such trusts, even though the act of incorporation may have for its main objects mere civil and municipal government and powers. 2 How. 190. This court announced the same principle again in the case of *McDonough v. Murdoch*, 15 How. 367, with other and new illustrations, and with direct reference to the capacity of a corporation to take such trusts, if within its general objects, or such as were collateral or incidental to its main purpose. There is nothing in the Ohio statute of wills to prevent corporations from taking by devise. Much was also said in the argument denying the legality of trusts, in consequence of the uncertainty of the beneficiaries, and because

the relatives of the testator were to have the preference. [ \* 506 ] As to the first, white boys and girls make as \*distinctive a status of a class who are to be the first beneficiaries of the trust, and the words in the 36th section, that "if any surplus shall remain, &c., it shall be applied to the support of poor white male and female orphans, neither of whose parents are living, and who are without any means of support," make as certain a description as could have been expressed.

It seems to us, now, that the objection relative to the condition of the beneficiaries is at variance with the established primary rule in respect to a charity, not only with reference to the statute of 43 Elizabeth, c. 4, but to a charity under the common law. The answer is, that a charity is a gift to a general public use, which extends to the rich as well as to the poor. *Jones v. Williams*, Amb. c. 651. Generally, devises and bequests having for their object establishments of learning are considered as given to charitable uses, under the statute of Elizabeth, *Attorney General v. Earl of Lansdale*; but that does not make a devise good to a college for purposes not of a collegiate character, intended chiefly to gratify the vanity of the testator. And we cannot be mistaken, that a devise to a corporation in trust for any person is good, and will be effectuated in equity. 1 Bro. Ch. Cas. 81. And *a fortiori*, a devise to a charitable corporation, in trust for any other charitable use, would be good. All property held for public purposes is held as a charitable use, in the legal sense of the term charity. *Law Library*, vol. 80, p. 116; *Grant on Corporations*.

We will not pursue the subject further; for, without having discussed either of the six objections made in the bill of the com-

plainants, or the points made by counsel in support of the demurrer to the bill, numerically, both have been under our examination; for all were appropriately in the argument of the cause, and in this opinion we meant to decide all of them, and have done so.

We cannot announce them more expressively than they were urged in the argument:

1. The doctrines founded upon the statute of 43 Elizabeth, c. 4, in relation to charitable trusts to corporations, \*either municipal or private, have been adopted by the [ \* 507 ] courts of equity in Ohio, *but not by express legislation; nor was that necessary to give courts of equity in Ohio that jurisdiction.*

2. The English statutes of mortmain were never in force in the English colonies; and if they were ever considered to be so in the State of Ohio, it must have been from that resolution by the governor and judges in her territorial condition; and if so, they were repealed by the act of 1806.

3. The city of Cincinnati as a corporation is capable of taking in trust devises and bequests for charitable uses, and can take and administer the devises and bequests in the will of C. McMicken.

4. Those devises and bequests are charities, in a legal sense, and are valid in equity, and may be enforced in equity by its jurisdiction in such matters without the intervention of legislation by the State of Ohio.

5. McMicken's direction, in section 32 of his will, that the real estate devised should not be alienated, makes no perpetuity in the sense forbidden by the law, but only a perpetuity allowed by law and equity in the cases of charitable trusts.

6. There is no uncertainty in the devises and bequests as to the beneficiaries of his intention; and his preference of particular persons, as to who should be pupils in the colleges which he meant to found, was a lawful exercise of his rightful power to make the devises and bequests.

7. The disposition which he makes of any surplus after the complete organization of the colleges is a good charitable use for poor white male and female orphans.

8. Legislation of Ohio upon the subject of corporations, by the act of April 9, 1852, does not stand in the way of carrying into effect the devises and bequests of the will.

This cause was argued on both sides with such learning and ability, that we feel it to be only right to the profession to acknowledge the assistance given to us in forming our conclusions; and our only regret is, that it should necessarily have extended this opinion to a greater length than we wished it to be.

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[ \* 508 ] \* We shall direct the affirmance of the decree dismissing the bill by the court below.

W. H. and CHARLES BELCHER, Plaintiffs in Error, v. WILLIAM A. LINN.

24 H. 508.

## CUSTOMS DUTIES—RULE OF ASSESSMENTS.

1. Where the question was of the appraisement of concentrated molasses, the appraisers were right in assessing it at its market value where produced, as affected by an export duty, whether that duty was paid in this case or not.
2. The appraisement is conclusive of the nature of the article, and of its market value in the place from whence it was imported.
3. No deduction is to be made for leakage from the quantity entered at the custom-house, notwithstanding any deduction for appraisement.

WRIT of error from the circuit court for the district of Missouri. The case is fully stated in the opinion.

*Mr. Phillips* and *Mr. Johnson*, for plaintiffs.

*Mr. Stanton*, attorney general, and *Mr. Black*, for defendant.

[ \* 516 ] \* Mr. Justice CLIFFORD delivered the opinion of the court.

This is a writ of error to the circuit court of the United States for the district of Missouri. The suit was commenced on the sixteenth day of September, 1854. It was an action of assumpsit, and the declaration contained a count for money had and received, together with three special counts, which are set forth at large in the transcript. Plaintiffs were merchants residing at St. Louis, in the State of Missouri, and the defendant was the surveyor of that port, appointed under the act of the second of March, 1831, upon whom, by that law were devolved the duties of collector, and the suit was instituted by the present plaintiffs against the defendant as such collector, to recover an alleged excess of duties which they had previously paid under protest on six cargoes of merchandise invoiced, among other things, as concentrated molasses. Other causes of action were also set forth in some of the special counts, to which reference will hereafter be made. Defendant pleaded that he never undertook and promised in manner and form as the plaintiffs had declared against him, and upon that issue the parties went to trial. All of the merchandise on which the duties were exacted and paid was imported from Matanzas, in the island of Cuba, and was consigned to the plaintiffs, who were doing business at St.

Louis. Under the laws of the United States, merchandise cannot be imported direct from a foreign port to the port of St. Louis, but all such importations are required to be first entered at the custom-house in New Orleans. Some brief reference to the usual course of proceeding in such cases, as required by law and the regulations of the treasury department, becomes indispensable, in order that the precise nature of the controversy may be fully understood. Upon the arrival at New Orleans of a vessel from a foreign port having on board merchandise exported from a foreign port, and consigned to a merchant at St. Louis, it is required, if the merchandise is subject to an import duty under the laws of the United States, that an entry of the same shall be made at the custom-house in New Orleans, in the same manner as required in case of entry for consumption, and the officers of the customs at that \*port [\* 517] then proceed to ascertain and assess the duties to be paid to the United States, precisely in the same way as if the merchandise had been destined for that market; whereupon a bond, called a transportation bond, is given by the importer or his agent to the United States, conditioned that the packages described in the invoice, with marks corresponding thereto, shall, within a specified time, be delivered to the surveyor and acting collector of the port of St. Louis. Notice of the proceedings ought then to be given by the collector of the port where the duties were ascertained and assessed to the acting collector of the port to which the merchandise is destined; and when the packages are received at the port of destination, they are placed in the custody of the acting collector of that port, who receives the duties, giving notice of that fact to the collector of the port where they were ascertained and assessed, and the collector of the latter port is then authorized by law to cancel the transportation bond given by the importer. Six vessels arrived at New Orleans, from Matanzas, in May and June, 1853, having on board merchandise shipped from the latter port, and consigned to the plaintiffs, and it appeared that certain portions of their respective cargoes were invoiced as concentrated molasses. Pursuant to the usual course of proceedings in such cases, the plaintiffs, on the arrival of the vessels at New Orleans, made separate entries of the respective cargoes, as required by law, at the custom-house of that port, in order that the duties due to the United States might be ascertained and assessed. In making the entries, however, they followed the invoice, describing the merchandise in question as concentrated molasses, and carrying out the dutiable value accordingly, without making any addition in the entry to the cost and value of the article on account of its peculiar character. One of

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the entries was made on the tenth day of May, 1853, and the last two were made on the sixth day of June, in the same year. Conforming to the requirements of law, the collector of the port submitted the matter to the local appraisers to appraise, estimate, and ascertain, the dutiable value of the merchandise, and they added [ \* 518 ] one-half real per arroba, equal to six and one-fourth \* cents for every twenty-five pounds Spanish weight, to the invoice valuation of the merchandise. From that decision the plaintiffs appealed, and called for an appraisal of the actual value of the goods in the foreign market by merchant appraisers. They, the plaintiffs, informed the collector on the eleventh day of June, 1853, that they should appeal, and on the fourteenth day of the same month the collector notified them that the appeal was allowed, but stated that he should not appoint appraisers until he heard from the department, as he desired the aid of a general appraiser. Considerable delay ensued; but on the 28th day of September, of the same year, the collector, acting under the instructions of the secretary of the treasury, and the plaintiffs, entered into a written agreement to the effect that they would substitute samples in the place of the merchandise, and submit the matters in dispute in all the cases to the determination of the board of general appraisers to be convened at the city of New York as soon as practicable, stipulating, at the same time, to abide by the appraisement of the board "in the same manner, and to the same extent, as if it had been made by merchant appraisers regularly appointed according to law." Accordingly, the general appraisers heard the several appeals, and on the nineteenth day of October, 1853, made a report in writing. Concentrated molasses constituted a portion of the cargo in five of the cases appealed, and it appeared by the report of the general appraisers that in all those cases they made an addition to the invoice value of that portion of the merchandise embraced in the entry. Of the five, it will be sufficient to give one as an example of the rest. It is as follows: "To add export duty on 522,338 lbs., at  $87\frac{1}{2}$  cts. per 500 lbs." Their reasons for making the addition are fully stated in their report. After stating that they had examined the samples, they say: "The board assume that both the concentrated melado and concentrated molasses are sugar in a green state, and they are borne out in this view of the case by the invoices themselves, the concentrated molasses in every case being invoiced per arroba as sugar, and not per keg as molasses; the casks are also charged as sugar casks. The concentrated molasses is \* not susceptible of being gauged, which [ \* 519 ] is another evidence that its proper classification is sugar.



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Plaintiffs proved that the goods were assessed at New Orleans, according to that appraisement, and that they afterwards paid the duties under protest, to the defendant at St. Louis. They protested against the including in the computation of the dutiable value of the goods any sum whatever for export duty, averring in the protest that no such duty was paid by them, or demanded by the authorities at the place of exportation. Testimony was also introduced by the plaintiffs tending to show that concentrated molasses was well known in the foreign market; that it was not at that time regarded as sugar; that it was not subject to the sugar duty; that no such duty was demanded or paid; and that the invoice price represented the fair market value. Their witnesses were cross-examined by the defendant, and from the cross-examination it appeared that the plaintiffs, in 1852, set up a sugar boiling establishment at Matanzas, and that among the products manufactured by them was the article invoiced as concentrated molasses, which it seems is melado, or syrup boiled down to a denser consistency, and is manufactured by boiling the melado, and thus evaporating the watery portions until the point of crystallization is reached. Concentrated molasses, as the witnesses state, is a recent manufacture, and was unknown in the foreign market until about the time plaintiffs commenced to produce it from their establishment. When the article first appeared, the authorities for a short time allowed it to be exported without exacting any duty; but it was soon classed with green sugars, and charged with an export duty of eighty-seven and a half cents for every twenty arrobas of twenty-five pounds Spanish weight. Like sugar, it is sold, invoiced, and valued by weight, and not by measure, like the ordinary article of molasses. On the other hand, the defendant called and examined one of the general appraisers. Among other things, he testified that—

“The board did make alterations from the invoice price or value by adding eighty-seven and a half cents for each five hundred pounds, invoice weight, and two reals or twenty-five \* cents to each barrel, in order to raise the same to the [ \* 520 ] actual market value, or wholesale price, at the period of exportation in the principal markets of the country from which the same had been imported.

“The sums in figures set out opposite these several entries were additions made by the board to the invoice value of the merchandise. The 87½ cents for each 500 pounds was added to make the market value of the sugars called ‘concentrated molasses,’ and 25 cents to each barrel was added to make the market value of the barrel.

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"The term, 'to add export duty on,' was used as expressive of the principle upon which this sum was added, and not as conveying the supposition or belief that an export duty had been paid by the importers, or even that such an export duty was legally due to the Cuban government; but it was added upon the principle that if the sum of 87½ cents per each 500 pounds was not payable for export duty, the value of the merchandise was thereby increased just that sum in the foreign market. Sugars being the basis of the appraisement, and 87½ cents per each 500 pounds being the export duty on the same, that sum was added to make the true foreign market value at the period of exportation."

To all this testimony the plaintiffs objected, but it was admitted by the court, and the plaintiffs excepted.

Thirteen points were then presented by the plaintiffs for instruction to the jury, all of which the court refused to give, and on the prayer of the defendant the jury were instructed, that "on the whole evidence the plaintiffs cannot recover." Under the rulings and instructions of the court the jury returned their verdict in favor of the defendant, and the plaintiffs excepted to the refusal of the court to instruct the jury as requested, and to the instruction given, that they, the plaintiffs, were not entitled to recover. On this branch of the case two questions are presented for decision: 1. Whether the addition was lawfully made to the invoice valuation of the merchandise described in the entry as concentrated molasses; 2. Whether the testimony of the general appraiser, as to the action of the board in making the appraisement, was properly admitted.

[ \* 521 ] \*1. It is provided by the act of the third of March, 1851, to the effect that the collector, in all importations subject to an *ad valorem* duty, shall cause the actual market value or wholesale price of the importation at the period and place of exportation to be appraised, estimated, and ascertained, and to such value or price shall be added all costs and charges, except insurance, including in every case a charge for commissions at the usual rates; and by the true construction of the act, and, indeed, by its very words, that appraisement, estimation, and ascertainment, when regularly made, becomes and is the true value of the importation at the place where the same was entered, "upon which the duties shall be assessed." By the eighth section of the act of the thirteenth of July, 1846, it is also provided, that it shall be the duty of the collector, within whose district dutiable goods may be imported or entered, to cause the dutiable value of such imports to be appraised, estimated, and ascertained, in accordance with the provisions of existing laws, and

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if the appraised value thereof shall exceed ten per cent. or more the value declared on the entry, then, in addition to the duties imposed by law on the same, there shall be levied, collected, and paid, a duty of twenty per centum *ad valorem* on such appraised value. But a proviso is added, that under no circumstances, shall the duty be assessed upon an amount less than the invoice value; any law of Congress to the contrary, notwithstanding. Importers are required to make an entry of their respective importations, which should always be accompanied by the invoice; and when the invoice is received, the packages for appraisement are designated on the invoice by the collector, who orders one in ten of them to the public store for the purposes of the appraisal. Examination of the selected packages is then made by the local appraisers, and if, in their opinion, the invoice value is too low, they increase it, and notify their doings to the collector, and if no appeal is taken from their appraisement by the importer, their decision in the premises is final and conclusive as to the dutiable value of the importation. Every importer, however, under those circumstances, has the right to appeal to merchant appraisers. \* Merchant [ \* 522 ] appraisers formerly consisted of two merchants, one chosen by the importer and one by the collector; but, under existing provisions of law, the collector may select a government appraiser, so that in the larger ports the board usually consists of a merchant selected by the importer, and a permanent appraiser selected by the collector. (9 Stat. at Large, 630.) On the appeal, the merchant appraisers, so called, examine the packages ordered to the public store, appraise, estimate, and ascertain, the actual market value or wholesale value thereof, at the period of exportation to the United States, in the principal markets of the country from which the goods were imported, and certify the value so appraised, estimated, and ascertained, to the collector; and in the absence of fraud, their decision is final and conclusive, and their appraisement in contemplation of law becomes, for the purposes of calculating and assessing the duties due to the United States, the true dutiable value of the importation. Act August 30, 1842, sec. 17, 5 Stat. at Large, 564; appraisement act, March 3, 1851, sec. 1, 9 Stat. at Large, 631. As was said by this court, in *Bartlett v. Kane*, 16 How. 272, the appraisers are appointed with powers, by all reasonable ways and means, to appraise, estimate, and ascertain, the true and actual market value and wholesale price of the importation. The exercise of these powers involves knowledge, judgment, and discretion. We hold, as we held in that case, that when power or jurisdiction is delegated to any public officer or tribunal over a subject-

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matter, and its exercise is confided to his or their discretion, the acts so done are in general binding and valid as to the subject-matter. The only questions which can arise between an individual and the public, or any person, denying their validity, are power in the officer and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer, whether executive, legislative, judicial, or special, unless an appeal or other revision is provided for by some appellate or supervisory tribunal prescribed by law. *United States v. Arredondo*, 6 Pet. 691; *Rankin v. Hoyt*, 4 How. 327; *Stairs v. Peaslee*, 18 How. 524. One of the questions presented in the case last cited was, whether, in [ \* 523 ] \*estimating the dutiable value of a certain article called cutch, the appraisers should have taken the value at the market of Calcutta, or London and Liverpool, or Halifax, at the period of exportation from the latter port; and the chief justice, speaking for the whole court, held, that in estimating the value of the cutch, it was the duty of the appraiser to determine what were the principal markets of the country from which it was exported into the United States, and that their decision that London and Liverpool were the principal markets for the article was conclusive. Applying these principles to the present case, it follows, we think, wholly irrespective of the parol testimony, that the value of the importations certified to the collector constituted the true and actual dutiable value of the merchandise embraced in the respective entries made by the importers, and there is nothing in the statement accompanying the report, when considered in connection with the report itself, that is in any manner inconsistent with the view here taken as to the legal effect of their action in the premises. On the contrary, it is difficult to misconstrue their report. They determine, in the first place, that the article described in the invoice and entry as concentrated molasses was in point of fact a species of green sugar, and that the invoice and entry were erroneous, not only with respect to the value affixed to the article, but also as to its description. Payment of duties cannot be avoided because the importation is misdescribed either in the invoice or the entry, or in both, at the same time. Appraisers are required to appraise, estimate, and ascertain, the true market value of the importation, no matter what name may be affixed to it by the importer, and he cannot be benefited in the estimation of the duties here by the fact that, by accident or otherwise, he succeeded in exporting the packages from the foreign country without being subjected to the usual and lawful exactions there imposed. New manufactures naturally and constantly give rise to new questions in regard to revenue;

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but it cannot operate to benefit the plaintiffs in this controversy, that the subordinate authorities, at the place of exportation, were for a time misled or deceived as to the real character of the product in question, or that they \*mistook the true [\*524] nature of their duty. Green sugar was subject to the export duty, but molasses was not; still, if the importations in question ought in fact to have been classed with the former, then it is clear that the importer, as matter of legal obligation, ought to have paid the export duty, and the determination of the appraisers was not an unreasonable one; that it was necessary to add a sum to the invoice valuation equal to the export duty to which it would have been subjected, if it had been correctly invoiced, in order to bring the dutiable value up to the actual market value or wholesale price in the foreign market. Both the report and the statement annexed to it must be taken *in pari materia*, and considered together; and when so construed, they do not appear to differ in any respect from the explanations given of them in the testimony of the general appraiser. Without regard to that testimony, it is not possible to hold that the board added the export duty to the several importations, regarding the article as molasses, because they expressly state in the outset that they assume that concentrated molasses is sugar in a green state, and proceed to give their reasons for the conclusion, deducing the reasons given from the various invoices, which, as they affirm, bear them out in that view of the case. It is clear, therefore, that the appraisers did not add the eighty-seven and a half cents to the invoice valuation as an export duty on molasses, and it is conceded that sugar in a green state was by law subject to the export duty; so that putting the parol testimony in question out of the case, still the plaintiffs are not entitled to recover.

2. But suppose it to be otherwise, and that the words, "to add export duty on," as contained in the statement annexed to the report, are to be separately considered; still, it is difficult to see how the admission can be of any service to the plaintiffs. They must still maintain that the importations were in fact molasses, and that the export duty was added by the appraisers to the invoice valuation of molasses, as such, else they have no standing in court, for they do not deny that if the produce in question was really sugar in a green state, that it was competent for the appraisers to correct the misdescription \*in the invoice and entry, [\*525] or disregard it, so as to perform their duty as required by law. Unless they have that right, then the grossest frauds may be committed by an importer with perfect impunity; and if they

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have that right, as clearly they must, then it follows that any dispute as to the nature of the produce imported, and its consequent classification in the invoice and entry, were questions of fact within the jurisdiction of the appraisers, and their decision is final and conclusive. On the other hand, if it be admitted that the words "to add export duty on" are ambiguous and of doubtful signification, then the case would be one where parol testimony would be admissible to explain the ambiguity, by showing what was done by the appraisers, and the manner in which the value of the importations was appraised, estimated, and ascertained. *U. S. v. Southmayd*, 9 How. 638; *Greeley v. Thompson et al.*, 10 How. 228; *Greeley v. Burgess*, 18 How. 413; *Samson v. Peaslee*, 20 How. 574; *Rankin et al. v. Hoyt*, 4 How. 335.

3. Plaintiffs also claimed in some of the counts of the declaration to recover back certain duties alleged to have been illegally exacted of them by the defendant, on certain barrels exported empty by them from the United States to Matanzas, and brought back filled with concentrated molasses. That claim, however, is not pressed in the case, because the same claim is embraced in another case, which is also before the court.

4. Another claim is to recover damage on account of the delay which ensued in completing the appraisement, and the consequent leakage and loss of the concentrated molasses; but we are not able to see any just ground for the claim, on the facts disclosed in the record. Appraisement of the goods is required by law, and as the detention of the goods is the necessary consequence of that requirement, it cannot be held, under the circumstances of this case, that it affords any ground of action against the defendant. Duties are required by law to be assessed on the goods, and the assessment is uniformly made on the quantity entered at the custom-house, without any allowance whatever for ordinary leakage and deterioration. [\* 526] \* *Marriott v. Brune et al.*, 9 How. 619; *Lawrence v. Caswell*, 13 How. 438. For these reasons we are of the opinion that there is no error in the record, and the judgment of the circuit court is therefore affirmed, with costs.

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**JAMES KNIGHT and others, Plaintiffs in Error, v. AUGUSTUS SCHELL.**

24 H. 526.

CUSTOMS DUTIES—MOLASSES BARRELS IMPORTED.

Barrels sent empty from the United States and returning to their owners filled with molasses do not return in the same condition in which they were exported, within

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the meaning of the act of congress; and their value should therefore be assessed in the computation of duties on the imported molasses.

THIS case comes up on a certificate of division of opinion between the judges of the circuit court for the southern district of New York.

*Mr. Williams*, for plaintiffs.

*Mr. Black*, attorney general, for defendant.

\* Mr. Justice CLIFFORD delivered the opinion of the court. [ \* 528 ]

This case comes before the court on a certificate of division of opinion from the circuit court of the United States for the southern district of New York. It was an action of assumpsit, brought by the present plaintiffs against the defendant, as the collector of the port of New York, to recover back certain duties paid by the plaintiffs under protest, upon certain barrels, in which molasses was imported into the United States from Matanzas.

It was proved, on the trial, that the plaintiffs, in the year 1859, imported from Matanzas 728 barrels of molasses by the brig Irene, 301 barrels of molasses by a vessel called the Yumuri, and 120 barrels of molasses by a vessel called the Trovatore; that the barrels containing the molasses were manufactured by the plaintiffs at Newburg, in the State of New York, and shipped from the port of New York empty to Matanzas, where they were filled with molasses, and returned in the three vessels above named to the port of New York; that the barrels were made up and completed in every respect before they were shipped to Cuba. They were returned, most of them, in the same vessels that carried them out from New York, and all of them in the same condition in which they were shipped or carried out from New York, except being filled with molasses.

They were filled with molasses at Cuba. When the barrels were brought back from Cuba filled with molasses, in the vessels above referred to, the collector claimed that the barrels themselves were dutiable, and that they were not entitled to entry duty free. He claimed a duty upon them at the rate of 24 per centum of their value at Cuba, and refused to allow them to be entered, unless such duty was paid; that the \*plaintiffs paid to the [ \* 529 ] defendant that portion of the duties which was upon the separate value of the barrels under protest, claiming that the barrels were not legally subject to the payment of any duty, but were exempt from duty by virtue of the provisions of the 47th section of the act of congress of March 2, 1799, and of schedule I of the existing tariff.

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The plaintiffs thereupon, having complied in all respects with the provisions of section fifth of the act of March 3, 1857, entitled "An act reducing the duties on imports, and for other purposes," brought this action to recover back the sum so paid under protest, as duties upon the separate value of the barrels, within the time prescribed in said act for bringing the same.

Upon the foregoing facts, the question arose whether barrels manufactured in the United States, and exported empty, and afterwards brought back to the United States filled with molasses purchased in Cuba, were brought back "in the same condition as when exported," according to the true intent and meaning of the acts of congress in that behalf; and the opinion of the judges being opposed on that question, it was certified to this court for decision. By the act of the second of March, 1799, it is provided, that on any goods, wares, or merchandise, of the growth or manufacture of the United States, which may have been exported to some foreign port or place, and brought back to the United States, and upon which no drawback bounty or allowance has been made, no duty shall be demanded. (1 Stat. at Large, 662.) Among other things, the ninth section of the act of the 30th of August, 1842, provides that all goods, wares, and merchandise, the growth, produce, or manufacture of the United States, exported to a foreign country, and brought back to the United States, shall be exempt from duty. (5 Stat. at Large, 560.) Dutiable articles, and those exempt from duty, are arranged in schedules by the act of the 30th of July, 1846, and the schedule of the latter class embraces goods, wares, and merchandise, the growth, produce, or manufacture of the United States, exported to a foreign country, and brought back to the United States *in the same condition as when exported*. (9

[ \* 530 ] Stat. at Large, 49,) To entitle the article to entry free \* of duty, it must also appear that it is one on which no drawback or bounty has been allowed. It will be observed, that the prior acts of Congress did not require that the goods should be brought back in the same condition as when exported, in order to entitle the importer to claim that they should be admitted to entry as included in the free list. That language is retained in the act of the third of March, 1857, without any alteration or amendment; so that although it may appear that the goods were the growth, produce, or manufacture of the United States; that they were exported to a foreign country and brought back to the United States; still, unless it also appears they were so brought back in the same condition as when exported, the collector of the port is not authorized to admit them to entry free of duty.



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Molasses barrels exported empty, when new, to Mantazas, and there filled, and, with their contents, brought back to the United States, cannot truly be said to be in the same condition as when they were exported. Oftentimes, when emptied of their contents, they are unfit for a second voyage, and seldom or never afterwards have the same market value as when they were new. When filled in the foreign port, the barrels have been applied to the commercial use for which they were manufactured; and when shipped with their contents, brought back to the United States, and are offered with their contents by the importer for entry at the custom-house, they have then, in respect to the revenue laws of the United States, acquired a new character. For all the purposes of appraisement, with a view to ascertain the dutiable value of the importation, the barrels, if filled, are regarded with their contents as packages; and it is the duty of the collector, by the express words of the statute, to order one in ten of the packages to the public store. Examination of the selected packages is then made by the local appraisers; and in case of appeal, the same packages are required to remain in the public store, and frequently constitute the only attainable basis of the subsequent adjudication by the merchant appraisers. Such packages are ordered to the public store in the same condition as when imported, and it is not possible to doubt

\*that Congress intended to include, in the words one in [ \* 531 ] ten of the packages, the covering of the importation, if belonging to the merchant, as well as the contents within it. Confirmation of these views, if any be needed, may be found in the almost unbroken practice of the treasury department. Take, for example, the treasury circular of the twenty-sixth of November, 1846, and it will be found that it fully justifies the conclusion to which we have come.

By that circular the several collectors were informed that—

“The principle upon which the appraisement is based is this: That the actual value of articles on shipboard at the last place of shipment to the United States, including all preceding expenses, duties, costs, charges, and transportation, is the foreign value upon which the duty is to be assessed. The costs and charges that are to be embraced in fixing the valuation, over and above the value of the article at the place of growth, production, or manufacture, are—

“The transportation, shipment, and transshipment, with all the expenses included, from the place of growth, production, or manufacture, whether by land or water carriage, to the vessel in which shipment is made to the United States. Included in these estimates is the value of the sack, *package*, *box*, *crate*, *hogshead*, barrel, bale,

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cask, can, and covering of all kinds, bottles, jars, vessels, and demi-johns." Mayo Comp. 350, 351.

Casks, including barrels as well as hogsheads, exported from the United States empty, and returned filled, have almost invariably, since the passage of the tariff act of the twentieth of July, 1846, been included among the dutiable charges, although of American manufacture, on the ground that, when so filled and brought back, they were not in the same condition as when exported, within the meaning of the provision of that act. Mayo Comp. 407. That construction has been affirmed by the treasury department, since the passage of the appraisement act of the third of March, 1851, as will appear by reference to the treasury circular adopted shortly after its passage. By that circular the department declares that—

[ \* 532 ] \* "The law enjoins that there shall be added 'all costs and charges, except insurance, and including, in every case, a charge for commissions at the usual rates.' These charges are as follows, to wit :

"They must include 'purchasing, carriages, dyeing, bleaching, dressing, finishing, putting up, and packing,' *together with the value of the sack, package, box, crate, hogshead, barrel, bale, cask, can, and covering of all kinds, bottles, jars, vessels, and demi-johns.*"

Without pursuing the discussion further, suffice it to say, that we are all of the opinion that the question under consideration must be answered in the negative, and we accordingly direct that it be certified to the court below, as the opinion of this court, that barrels manufactured in the United States, and exported empty to Cuba, and afterwards brought back to the United States filled with molasses purchased in Cuba, were not brought back "in the same condition as when exported," within the true intent and meaning of the acts of Congress in that behalf.

*Order.*

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of New York, and on the point or question upon which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of Congress in such case made and provided, and was argued by counsel. On consideration whereof, it is the opinion of this court that barrels manufactured in the United States, and exported empty to Cuba, and afterwards brought back to the United States filled with molasses purchased in Cuba, are not brought back in the same

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condition as when exported, according to the true intent and meaning of the acts of Congress in that behalf. Therefore it is now here ordered by the court that it be so certified to the said circuit court.

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## BELCHER v. LINN.

24 H. 533.

THE same question involved in the above case was decided the same way in this. It was a part of the case reported *ante*, page 246, and needs no further report.

Mr. Justice CLIFFORD delivered the opinion of the court.

This is a writ of error to the circuit court of the United States for the district of Missouri. The suit in the court below was brought by the present plaintiffs against the defendant as the surveyor and acting collector of the customs at St. Louis, to recover the amount of certain duties alleged to have been illegally exacted of the plaintiff, and paid by him to the defendant under protest. As alleged in the declaration, the duties were assessed on the value of a large number of barrels, manufactured by the plaintiffs in the United States, exported empty to Matanzas, in the island of Cuba, and brought back in 1853, filled with concentrated molasses or sugar. It was an action of assumpsit, and the declaration contained the usual counts for money had and received, together with a special count detailing all the circumstances on which the claim was founded. Defendant appeared, and the parties went to trial upon the general issue. At the close of the evidence, five prayers for instructions to the jury were presented by the plaintiffs, but the court refused to give any one of them; and at the request of the defendant, instructed the jury that on the whole evidence in the case the plaintiffs could not recover against the defendant. Whereupon the jury returned their verdict in favor of the defendant, and the plaintiffs excepted, and sued out this writ of error to reverse \* the judgment rendered on the verdict. Under the [ \* 534 ] circumstances of this case, as exhibited in the transcript, it will not be necessary to refer with much particularity to the evidence, as the sole question raised in the record is, whether the duties imposed upon the barrels by the appraisers were lawfully exacted. Satisfactory proof was introduced by the plaintiffs, showing that all the barrels were manufactured by the plaintiffs in the United States, and that they were exported empty to the foreign market, and there filled with concentrated molasses, or sugar in a

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green state, which was destined for the market of St. Louis. One of the plaintiffs' witnesses testified that the barrels, when they were received at the sugar-boiling factory of the plaintiffs in Matanzas, were empty, but when sent from thence to the United States, they were filled with the different products of that establishment. Such of the barrels as were designated to receive molasses were filled at the bung without being unheaded, but it was necessary to take out one head from those which were to be filled with concentrated molasses, and all such of course had to be re-coopered. And the same witness states, that in some instances it was necessary, after the barrels were placed in the sugar-boiling factory, to add new hoops, but in all other respects the barrels were filled and sent back in the same condition in which they were received. Unless the barrels were brought back in the same condition in which they were when exported, then it is clear that they could not be admitted to entry free of duty; and so, if the value of the barrel in which a dutiable article or product is imported is one of the proper charges which are required by law to be added to the actual market value or wholesale price of the importation, then it is equally clear that the same conclusion must follow. In the case of *James Knight and others v. Augustus Schell*, decided at the present term, both of those questions were determined against the plaintiffs in this suit. That case was determined upon full consideration, and we are all satisfied that the decision of the question was correct, and that the reasons given for the decision are all applicable to this case, and therefore they need not be repeated. It is impossible to hold that [ \* 535 ] \*molasses barrels, manufactured here and exported to a foreign port, and there filled with molasses, whether it be the ordinary article or that denominated concentrated, and then reimported with their contents to this country, were brought back in the same condition as when exported, within the true intent and meaning of the acts of congress. Contrary to the views of the plaintiffs, we think the words, "the same condition," mean not only that the identity of the article exported is preserved, but that its utility for its original purpose is unchanged. On this point, we adopt the view taken by the defendant, because it appears to be more consonant with the language of the provision under consideration, and with the obvious intent of congress in passing it. Suppose it be so; then it almost necessarily follows, even within the principle assumed by the plaintiffs, that barrels filled with molasses and imported here formed a part of the charges of importation. They admit that such is the general rule, but seek to establish an exception which would include the present case. Now, unless the barrels

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were brought back in the same condition as when exported, then the reason on which the supposed exception is founded fails; and it is difficult to see why the present case does not fall within the admitted general rule. Outside packages belonging to the merchant were required to be estimated and their value added to the actual cost of importation at a very early period; and without referring to the subsequent acts of congress and the regulations of the department, which were cited in the briefs of the counsel, the better opinion is, we think, that charges include in general the value of the sack, package, box, crate, barrel, hogshead, bale, cask, all outside coverings belonging to the merchant, or, so to speak, the integument of the importation, and that the value of the same, to be estimated at the usual cost to the importer, should properly be added to the actual market value or wholesale price of the importation, in order to ascertain the true basis on which to assess the duty. For these reasons we are of the opinion that the rulings and instruction of the circuit court were correct, and the judgment is accordingly affirmed, with costs.

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PIERRE A. BERTHOLD and others, Plaintiffs in Error, v. EDWARD GOLDSMITH.

24 H. 536.

PARTNERSHIP AGENCY—COMMISSION MERCHANTS.

1. Where a merchant in Baltimore, through one H., made arrangements to consign goods to commission merchants in St. Louis, and before any goods were consigned wrote them a letter in which he stated the terms of the transaction, among which they were guarantied, and would be held responsible for all goods shipped to them; it was held they were so responsible, though they had turned the goods over to the agent through whom the original arrangement was made.
2. That it did not vary their liability that said agent was to have half the profits as compensation, with a guaranty by the consignor that his compensation should amount to \$1,800 at all events.
3. There was no evidence in the case of any authority of H. to interfere with the goods or their disposition after they were received by consignees; and the latter are responsible, though they delivered them to him.

WRIT of error to the circuit court for the district of Missouri.  
The facts are stated in the opinion.

*Mr. Blair*, for plaintiffs in error.

*Mr. Carlisle* and *Mr. Badger*, for defendant.

\* Mr. Justice CLIFFORD delivered the opinion of the court. [ \* 537 ]  
This is a writ of error to the circuit court of the United

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States for the district of Missouri. The declaration in this case was filed on the second day of September, 1858, by the present defendant, who was the plaintiff in the court below. It was an action of assumpsit, and the declaration contained five counts. Without attempting to give any very precise analysis of the declaration, it will be sufficient to say, that the plaintiff alleged, that on the twenty-ninth day of August, 1857, at the special instance and request of the defendants, he sent and consigned to them sundry cases and boxes of cigars of great value, in order that they might sell and dispose of the same for him, on their guaranty of sales, for a certain commission or award, and that the defendants, in consideration thereof, undertook, and then and there promised to sell and dispose of the cigars on his account, and to be answerable to him for the due payment of the sums for which the same should be sold, and pay over the proceeds to him. And the complaint is, that they not only neglected and refused to perform their promises in that behalf, but that they disposed of the consignment to their own [ \* 538 ] use. Defendants appeared and \*demurred to the declaration, but the court overruled the demurrer, and the parties subsequently went to trial upon the general issue. Testimony was introduced on both sides, and after the arguments were closed, the defendants presented to the court certain prayers for instruction, which were refused. And under the instructions given by the court the jury returned their verdict in favor of the plaintiff for the sum of three thousand dollars. Exceptions were duly taken by the defendants, not only to the refusal of the court to instruct the jury as requested, but also to the instructions given, and the question to be decided is, whether, upon the facts disclosed in the record, there was any error in the action of the court. It appears from the evidence that the plaintiff was a merchant, residing at Baltimore, in the State of Maryland, and that the defendants were commission merchants, doing business at St. Louis, in the State of Missouri. For the purposes of this investigation, it is conceded that the cigars were sent by the plaintiff, and that they were duly received by the defendants, and there is no dispute as to the quantity or their value. Some of the cigars were forwarded by railroad, but the largest invoice was shipped, in bond, with the understanding that the defendants would make the necessary advances for the duties and other charges. Accordingly they received the cases and boxes containing the cigars at the custom-house, and paid the duties and freight. All of the cigars were sent and received under the terms and conditions specified in a certain letter from the plaintiff to the defendants, to which more particular reference will presently be made.

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Prior to the date of that letter, it had been agreed between the plaintiff and one H. F. Hook, that the latter should go to St. Louis, and if practicable, make an arrangement there with some responsible commission house to accept consignments of cigars from the plaintiff, and sell and dispose of them on his account. It seems that Hook wanted employment, and the plaintiff wanted to extend his business. They accordingly agreed to make an effort of that kind, and if successful, that Hook should have half the profits, with a guaranty from the plaintiff that his compensation should amount to eighteen hundred dollars. Pursuant to that \*understanding Hook went to St. Louis and made an ar- [\* 539] rangement with the defendants, and communicated the terms and conditions of it to the plaintiff. By the terms of this arrangement the defendants were to sell for a commission of two and a half per cent., and were to guaranty the sales for a like commission. They were to receive the goods in bond, at the custom-house, make the necessary advances for duties and charges, and accept drafts drawn by the plaintiff against the consignments. Having learned the nature of the proffered terms, the plaintiff, on the twenty-eighth day of August, 1857, wrote to the defendants the letter to which reference has already been made. Referring in express terms to that arrangement, he informed the defendants by that letter that he had consigned to them an invoice of cigars, and requested them to render to him, when the cigars were sold, an account of the sales; and what is more, he therein stated to the defendants that if they were willing to make advances on such goods, he would consign to them, in a short time, additional invoices to a large amount; and in conclusion, employed the following language: "All shipped to your house by me; I will hold you responsible." Full proof is exhibited in the record, that all the cigars in controversy were sent and received under the arrangement referred to in that letter, and the person who made the arrangement with the defendants testified that it was never changed. He remained in St. Louis to negotiate sales, and he also testified that he managed the whole business and conducted the correspondence with the plaintiff. Defendants dissolved their partnership on the first day of January, 1858, so that it became desirable for them to get rid of their consignments; and on the fifteenth day of the same month, all of the cigars not previously sold were turned over to another firm, pursuant to an order drawn on them by the person who negotiated the arrangement. That step was taken without consulting the plaintiff, and without his knowledge, and ten days later the defendants wrote to the plaintiff and declined to render an account of sales,

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affirming that they had made none, and assuming, in effect, that the person who negotiated the arrangement was the general agent of the plaintiff with respect to the cigars; \*and they informed the plaintiff in the same letter, that he, the supposed agent, on withdrawing the consignment, had paid back to them what money they had advanced on the same. Much other testimony was introduced on the one side or the other, but the statement already given exhibits the material facts necessary to be considered in this stage of the investigation.

Two theories were assued by the defendants at the trial, and the prayers for instruction were all based upon the one or the other of those theories. It was insisted, in the first place, that the person who negotiated the arrangement and finally withdrew the consignment was a partner with the plaintiff in the whole transaction; and if not, then, secondly, that he was the agent of the plaintiff, and, as such, had authority to withdraw the consignment and acquit the defendants from all further responsibility. But the presiding justices instructed the jury, in substance and effect, that the defendants were responsible for the cigars consigned under the letter of instructions, whether sold directly by themselves as factors of the plaintiff, or by Hook, as authorized to negotiate sales, provided the cigars were received into their possession; that the defendants were authorized by the letter to sell the cigars in the usual course of business, and if they found that Hook was also authorized to negotiate sales, then the sales by him in the usual way were also valid, and that the defendants, by the letter, were to make the advances, have two and a half per cent. commissions on sales, and two and a half per cent. on guaranty of sales, and were to account to the plaintiff. Among other things, they also instructed the jury, that there was no evidence to show any authority from the plaintiff to turn the cigars over to an auctioneer to be sold, and that the plaintiff, therefore, was entitled to recover the net proceeds of the cigars sold, either by the defendant or Hook, if the latter was authorized to negotiate sales, and the market value at St. Louis of the residue, less the charges paid for freight, storage, insurance, drayage, and duties. Both of the defenses set up in the court below are still insisted upon in this court, but we think neither of them can be sustained, and that the instructions given to the jury were correct.

[ \* 541 ] \*1. Partnership is usually defined to be a voluntary contract between two or more competent persons, to place their money, effects, labor, and skill, or some one or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them. But part-



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nership and community of interest, independently considered, are not always the same thing ; for the first, as between the partners themselves, is founded upon the copartnership agreement which prescribes the relation they bear to each other, and of itself creates the community of interest ; but the last may exist, notwithstanding there has been no agreement between the parties. Part owners of a ship, for example, are uniformly treated as tenants in common, and not as partners, although it cannot be denied that there is a community of interest between them in every part of the vessel, and each is entitled to a share of her earnings in proportion to his undivided interest, and must also share the loss. Joint owners of merchandise may consign it for sale abroad to the same consignee ; and if each gives separate instructions for his own share, it is well-settled law that these interests are several, and that they are not to be treated as partners in the adventure. Numerous illustrations of the principle are to be found in the decisions of the courts, of which we will give but one more at the present time. Where a broker or other agent purchases goods for several persons, each agreeing to take a certain portion of the entire parcel, it is clear, if there is no arrangement that the goods shall be sold on joint account, that the transaction does not amount to a partnership, although there is undeniably a community of interest in the goods so purchased. These examples will be sufficient to show that while every partnership is founded on a community of interest, it is, nevertheless, incorrect to suppose that every community of interest necessarily constitutes the relation of partnership within the meaning of the commercial law. Whenever it appears that there is a community of interest in the capital stock, and also a community of interest in the profit and loss, then it is clear that the case is one of actual partnership between the parties themselves, and of course it is \*so as to third persons. All of the decided cases, [\* 542] however, agree that it is seldom or never essential that both of these ingredients should occur in the case in order to establish that relation. Cases occur, undoubtedly, where a community of interest in the property, without any regard to the profits, will almost necessarily lead to the conclusion that the relation between the parties was that of partnership ; and, under some circumstances, that conclusion will follow, although the sale of the property for the joint interest may not be contemplated by the parties. On the other hand, it is equally clear that there may be such a community of interest in the profits without regard to loss, and without any community of interest whatever in the property as will establish that relation. Participation in the profits, however, will not alone

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create a partnership between the parties themselves as to the property, contrary to their intention. But merchants and traders are often justly held to be partners as to third persons, where they are not to be deemed such, expressly or impliedly, as between themselves. Judge Story distributes the cases in which such a liability exists as to third persons into five classes, and it is obvious that the present case does not fall within any principle of that classification. Story on Part. section 542; Greenl. Ev. section 482. He admits, however, that the pressure of the general doctrine is most severely felt in that class of cases where all the parties charged, as partners, are to share the profits between them, but the losses are to be borne exclusively by one of their number. Actual participation in the profits as principal, we think, creates a partnership as between the parties and third persons, whatever may be their intentions in that behalf, and notwithstanding the dormant partner was not expected to participate in the loss beyond the amount of the profits. Every man who has a share of the profits of a trade or business ought also to bear his share of the loss, for the reason, that in taking a part of the profits, he takes a part of the fund of the trade on which the creditor relies for payment. *Grace v. Smith*, 2 W. Black. 998; *Waugh v. Carver*, 2 H. Black. 235. Actual partnership, as between a creditor and the dormant partner, is considered by [\* 543] the law to subsist \*where there has been a participation in the profits, although the participant may have expressly stipulated with his associates against all the usual incidents to that relation. *Pond v. Pittard*, 3 Mee. and Wels. 357. That rule, however, has no application whatever to a case of service or special agency, where the employee has no power as a partner in the firm and no interest in the profits, as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a proportion of the same, as a compensation for his services.

Merchants are obliged to have clerks, and oftentimes find it necessary to employ brokers or special agents to effect sales, and it is no more detrimental to their creditors that such employees should be paid out of the profits of their trade than from any other source of income within their disposal. Unless the supposed dormant partner is in some way interested in the profits of the business, as principal, it is plain that he cannot bring suit as a partner, and go into equity and compel an account; nor can it be held that he has any such lien on the profits as a court of equity may enforce; and if not, then his condition is the same as that of an ordinary creditor, and he must pursue his remedy against his employer. *Denny*

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*et al. v. Cabot et al.*, 6 Met. 90; *Vanderburg v. Hull*, 20 Wen. 70. Repeated decisions have recognized this distinction, and although it may happen, as heretofore, that cases will arise on the one side or the other of the line, approaching in their facts so near to each other that the difference between them may appear to be unsubstantial, yet the distinction itself, we think, is well founded in reason, and that the only difficulty is in the application of the principle on which it rests. *Hallet v. Desban*, 14 Lou. An. 529.

No such difficulty, however, arises in this case. Defendants knew the exact relation which Hook sustained to them, and to the plaintiff, and they had the letter of the plaintiff in their possession, informing them that he should hold them responsible for the cigars. They knew what the arrangement was, and that the goods had been sent by the plaintiff and received by them, on the terms and conditions specified in that letter. \* Irrespect- [ \* 544 ] ively of the guaranty, it is difficult to see how Hook could have any interest in the profits as a partner with the plaintiff. He had no interest in the property, and by the arrangement which he himself negotiated, the cigars were to remain for sale in the custody and control of the defendants, as commission merchants, and they stood responsible to the plaintiff for the proceeds. But he did not rely upon the profits for his compensation, for unless one-half the profits exceed eighteen hundred dollars a year, he would neither be benefited nor injured by the success or failure of the adventure, except so far as the latter result might have a tendency to induce his employer to dispense with his services. Little or nothing was ever realized from the enterprise, and of course no excess of profits over the amount of the guaranty was ever earned. It is quite obvious, therefore, that the theory of the defendants on this branch of the case cannot be sustained.

2. It is insisted by the defendants that Hook was the agent of the plaintiff, and as such that he had authority to withdraw the cigars from their custody and control, and turn them over to the other firm. On that point, the presiding justice instructed the jury that there was no evidence in the case to support that theory, and, after a careful examination of the evidence exhibited in the transcript, we entirely concur in that view of the case; and the judgment of the circuit court is therefore affirmed, with costs.

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JOHN J. WHEELER, Plaintiff in Error, v. A. J. NESBITT and others.

24 H. 544.

## MALICIOUS PROSECUTION—PROBABLE CAUSE.

1. An instruction in a suit for malicious prosecution that, in order to excuse the defendants, it must appear they had probable cause for the prosecution, or that they acted *bona fide* without malice, is no ground of error as against the plaintiff.
2. So also a charge, that if the arrest was wanton and reckless, and no circumstances existed to induce a reasonable and dispassionate man to believe the party guilty, then the jury ought to infer malice, is favorable instead of prejudicial to plaintiff.
3. Where the warrant is in due form, the presumption is in favor of the magistrate that it issued on sufficient evidence; and if there is probable cause, the magistrate may detain the prisoner a reasonable time for examination.

WRIT of error to the circuit court for the middle district of Tennessee.

*Mr. Underwood*, for plaintiff in error.

*Mr. Phillips*, for defendants.

[ \* 546 ] \*Mr. Justice CLIFFORD delivered the opinion of the court.

This is a writ of error to the circuit court of the United States for the middle district of Tennessee. John J. Wheeler, the plaintiff in error, complained in the court below against the present defendants in a plea of trespass on the case, as will more fully appear by reference to the declaration which is set forth at large in the transcript. It alleged three distinct causes of action, and each cause of action was set forth in two separate counts. All of the counts, however, were founded upon the same transaction, so that a brief reference to the first, third, and fifth of the series will be sufficient to exhibit the substance of the declaration, and the nature of the supposed grievances for which the suit was instituted. First, the plaintiff alleged that the defendants, falsely and maliciously contriving and intending to injure him in his good name and reputation, on the eighteenth day of September, 1856, at a certain place within the jurisdiction of the court below, went before a certain justice of the peace for that county, and falsely and maliciously, and without any reasonable or probable cause, charged the plaintiff with having feloniously stolen four horses, which he then and there had in his possession, and caused and procured the magistrate to grant a warrant, under his hand and seal, for the apprehension of the plaintiff, upon that false, malicious, and groundless charge; and that he, the plaintiff, was accordingly arrested by virtue of the warrant so procured, and falsely and maliciously, and without any reasonable or probable cause, imprisoned in the prison-house of the State

there situate for the space of seven days; and that at the expiration of that period he was fully acquitted and discharged of the supposed offense, and that the prosecution for the same was wholly ended and determined. Secondly, the plaintiff alleged that the defendants, on the same day and at the same place, with force and arms assaulted him, the plaintiff, and forced and compelled him to go to the prison-house of the State there \* situate, [ \* 547 ] and then and there falsely and maliciously, and without any reasonable or probable cause, imprisoned him for the space of seven days, contrary to the laws and customs of the State. Thirdly, the plaintiff alleged that the defendants, on the same day and at the same place, did unlawfully and falsely conspire, combine, and agree among themselves and with others, that the first-named defendant, with a view to procure a warrant for the arrest and imprisonment of the plaintiff, should go before a certain magistrate of the county, and make oath, according to law, that he, the complainant, verily believed that the plaintiff, with two other persons, had committed the aforesaid offense, and that the other defendants in this suit should attend the preliminary examination of the plaintiff before the magistrate, and then and there aid, abet, and assist the complainant, by their testimony, influence, and advice, in prosecuting the charge; and the plaintiff averred that the defendants so far carried their corrupt and evil conspiracy and agreement into effect, that they procured the warrant from the magistrate by the means contemplated, and that he, the plaintiff, was then and there arrested by virtue of the same, and imprisoned upon that false, malicious, and groundless accusation for the space of seven days, and that at the expiration of that period he was fully acquitted and discharged of the supposed offense. Such is the substance of the declaration, so far as it is deemed material to reproduce it at the present time. Testimony was introduced by the plaintiff tending to show that he was the lawful owner of the four horses described in the warrant on which he was arrested; and he also proved, without objection, that he had always sustained a good character in the neighborhood where he resided. He also introduced a duly-certified copy of the complaint made against him by the first-named defendant, and a duly certified copy of the warrant issued by the magistrate. Those copies show that the complainant, on the eighteenth day of August, 1856, made the accusation under oath, as required by the law of the State, and that the magistrate thereupon granted the warrant for the apprehension of the plaintiff, together with two other persons, who were jointly accused with him of the same offense. Both \* the complaint and warrant were [ \* 548 ]

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in regular form, and the latter contained the usual directions, that the persons accused should forthwith be brought before the magistrate who issued it, or some other justice of the peace for the county, to answer to the charge, and be dealt with as the law directed. Whether the officer made any formal return on the precept or not does not appear; but it is stated in the bill of exceptions that the warrant was placed in the hands of the sheriff, and that the persons accused of the offense, including the plaintiff, were on the same day brought before the magistrate for trial. When brought into court they were not prepared for the examination, and at their request the trial was postponed for twelve days, or until they should have sufficient time to procure the attendance of certain witnesses, whose testimony was necessary, as they represented, to establish their defense; and the minutes of the proceedings before the magistrate state, in effect, that the accused, "not being able to give any security for their appearance" at the time appointed for the trial, "or not offering to give any, the sheriff was directed to hold them in custody to answer to the charge." Pursuant to that order the plaintiff, as well as the other persons accused, remained in the custody of the sheriff, and were kept by him in the prison-house of the State there situate until the witnesses of the plaintiff appeared; and on the twenty-fifth day of September, 1856, they were again brought before the magistrate, and after the witnesses on both sides were examined, all of the accused were fully acquitted and discharged of the alleged offense. To show that the prosecution was groundless, and without any reasonable or probable cause, the plaintiff examined several witnesses to prove the circumstances under which he was arrested, and the substance of the evidence adduced against him at the trial before the magistrate. One of the defendants is the magistrate who granted the warrant, and the other defendants were witnesses for the State in the criminal prosecution. All of the defendants were citizens of the State of Tennessee, and the plaintiff was a citizen of the State of Kentucky, and it did not appear that the parties had any acquaintance with each other prior to this transaction. No attempt was made \* on the part of the plaintiff to prove express malice, and there was no direct evidence of any kind to support the allegation of conspiracy. On the other hand, the defendants insisted that there was no evidence to support the charge of conspiracy or of false imprisonment, and that the prosecution was instituted in good faith, and conducted throughout upon reasonable and probable cause; and to establish that defense they called and examined several witnesses to prove what the evidence was which was given against the plaintiff

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at the trial before the magistrate. Without entering into particulars, it will be sufficient to say that the evidence adduced by the defendants had some tendency to maintain the defense. Under the rulings and instructions of the court the jury returned their verdict in favor of the defendants, and the plaintiff excepted to the charge of the court. Unaided by the assignment of errors, it would be difficult to ascertain, with any degree of certainty, to what particular part of the charge of the court the exceptions were intended to apply. But that difficulty is so far obviated by the specifications contained in the printed argument filed for the plaintiff, that with some hesitation we have concluded that the case, as presented in the transcript, is one which may be re-examined in this court.

1. Among other things, the presiding justice instructed the jury that in order to excuse the defendants on the first two counts in the declaration, it must appear that they had probable cause for the prosecution of the plaintiff for the offense described in the complaint and warrant, or that they acted *bona fide* without malice. Objection is made by the counsel of the plaintiff to this part of the charge of the court; but we think it was quite as favorable to him as the well-settled rules of law upon the subject would possibly allow. To support an action for a malicious criminal prosecution the plaintiff must prove, in the first place, the fact of prosecution, and that the defendant was himself the prosecutor, or that he instigated its commencement, and that it finally terminated in his acquittal. He must also prove that the charge preferred against him was unfounded, and that it was made without reasonable or probable cause, and that the defendant in making or instigating it \*was actuated by malice. Proof of these several facts is [ \* 550 ] indispensable to support the declaration, and clearly the burden of proof in the first instance is upon the plaintiff to make out his case, and if he fails to do so in any one of these particulars, the defendant has no occasion to offer any evidence in his defense. Undoubtedly, every person who puts the criminal law in force maliciously, and without any reasonable or probable cause, commits a wrongful act; and if the accused is thereby prejudiced, either in his person or property, the injury and loss so sustained constitute the proper foundation of an action to recover compensation. Malice alone, however, is not sufficient to sustain the action, because a person actuated by the plainest malice may nevertheless prefer a well-founded accusation, and have a justifiable reason for the prosecution of the charge. Want of reasonable and probable cause is as much an element in the action for a malicious criminal prosecution as the evil motive which prompted the prosecutor to

make the accusation; and though the averment is a negative one in its form and character, it is nevertheless a material element of the action, and must be proved by the plaintiff by some affirmative evidence, unless the defendant dispenses with such proof by pleading singly the truth of the several facts involved in the charge. *Morris v. Corson*, 7 Cow. 281. Either of these allegations may be proved by circumstances, and it is unquestionably true that want of probable cause is evidence of malice, but it is not the same thing; and unless it is shown that both concurred in the prosecution, or that the one was combined with the other in making or instigating the charge, the plaintiff is not entitled to recover in an action of this description. Add. on W. and R. Accordingly, it was held in *Foshay v. Ferguson*, 4 Den. 619, that even proof of express malice was not enough without showing also the want of probable cause; and the court go on to say, that however innocent the plaintiff may have been of the crime laid to his charge, it is enough for the defendant to show that he had reasonable grounds for believing him guilty at the time the charge was made. Similar views were also

expressed in *Stone v. Crocker*, 24 Pick. 83. There are two [\* 551] things, say the court in that case, \*which are not only indispensable to the support of the action, but lie at the foundation of it. The plaintiff must show that the defendant acted from *malicious motives* in prosecuting him, and that he had *no sufficient reason* to believe him to be guilty. If either of these be wanting, the action must fail; and so are all the authorities from a very early period to the present time. *Golding v. Crowle*, Sayer, 1; *Farmer v. Darling*, 4 Burr, 1,974; 1 Hillard on T. 460.

It is true, as before remarked, that want of probable cause is evidence of malice for the consideration of the jury; but the converse of the proposition cannot be sustained. Nothing will meet the exigencies of the case, so far as respects the allegation that probable cause was wanting, except proof of the fact; and the *onus probandi*, as was well remarked in the case last referred to, is upon the plaintiff to prove affirmatively, by circumstances or otherwise, as he may be able, that the defendant had no reasonable ground for commencing the prosecution. *Purcell v. McNamara*, 9 East. 361; *Willans v. Taylor*, 6 Bing. 184; *Johnstone v. Sutton*, 1 Term, 544; Add. on W. and R. 435; *Turner v. Ambler*, 10 Q. B. 257.

Applying these principles to the present case, it necessarily follows that so much of the charge of the court as is now under consideration furnishes no just ground of complaint on the part of the plaintiff. On the contrary, it is quite obvious that unless it was accompanied by prior explanations, not stated in the bill of



exceptions, it was even more favorable to the plaintiff than he had a right to expect. He was bound to make out his case; and if it did not appear that the prosecution had been commenced with malicious motives, and without reasonable and probable cause, then the plaintiff was not entitled to a verdict. *Mitchel v. Jenkins*, 5 Barn. and Adol. 594.

2. With these remarks as to the first ground of complaint, we will proceed to the examination of the second, which is also based upon a detached portion of the charge of the court. After stating the alternative proposition already recited, the presiding justice proceeded to define the term, probable cause. He substantially told the jury that probable cause was the \*exist- [\* 552] ence of such facts and circumstances as would excite the belief, in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted.

Having thus defined the meaning of the term probable cause, he then proceeded to say that the want of probable cause afforded a presumption of malice, but that such presumption might be rebutted by other evidence, showing that the party acted *bona fide*, and in the honest discharge of what he believed to be his duty; and then gave the instruction to which the second objection applies. It is as follows: "If, however, the jury find that the arrest was wanton and reckless, and that no circumstances existed to induce a reasonable, dispassionate man to believe that the defendant was guilty of having stolen the horses he had in his possession, then the jury ought to infer malice." Clearly, this part of the charge must be taken in connection with what preceded it, and when so read and understood, it is impossible to hold that it is incorrect, except, perhaps, the closing paragraph is put rather strongly in favor of the plaintiff. Whether the prosecution was or was not commenced from malicious motives, was a question of fact, and it was for the jury to determine whether the inference of malice was a reasonable one from the facts assumed in the instruction. Be that as it may, it is quite certain that it furnishes no ground of exception to the plaintiff, and in all other respects we hold the instruction to be correct.

3. One other objection only remains to be considered. After stating the fact that the magistrate who issued the warrant was sued as a joint defendant, the presiding justice told the jury that the warrant, as given in evidence, was in due form, and that the presumption was, from the statements found therein, that there was sufficient evidence before the magistrate to authorize him to

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issue it; and then follows that portion of the instructions to which the third objection applies. He then told the jury that if there was probable cause for the arrest of the defendant, he could be lawfully detained a reasonable time till the warrant was issued and executed. It is insisted by the plaintiff that this in- [ \*553 ] struction was both abstract \*and misleading. But that theory is wholly without support from anything that appears in the record, and, in point of fact, is directly contradicted by what does appear. To sustain that remark it is only necessary to refer to the declaration, where it is alleged that the plaintiff was detained in prison for the space of seven days, and the minutes of the proceedings before the magistrate show that he was so detained as the necessary consequence of his own request for delay, and the neglect on his part to offer any satisfactory security for his appearance at the time appointed for the examination. Those minutes were introduced by the plaintiff; and in the absence of any proof to the contrary, it must be assumed that they speak the truth. In view of the whole case, we think the charge of the court to the jury was correct, and that there was no error in the record. The judgment of the circuit court is therefore affirmed, with costs.

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MYRA CLARK GAINES, Appellant, v. DUNCAN N. HENNEN.

24 H. 553.

EFFECT OF PROBATE OF WILL BY STATE COURT—LOUISIANA LAW OF WILLS AND DESCENTS—EVIDENCE IN SUCH CASES.

1. Since the previous suits decided in this court against the present appellant, claiming as heir of Daniel Clark, the will of said Clark of 1813 has been proved and established as his last will and testament by the judgment of the supreme court of Louisiana.
2. The propositions of law and the view of the evidence taken by that court has the concurrence of this court, and are in accordance also with the common law.
3. This being a suit to recover of the defendant, Hennen, the real estate devised by that will to plaintiff, the executors of the will of 1811, and Mary Clark, the devisees of that will, were not necessary parties to the suit. Nor was it necessary to enable plaintiff to assert her rights under the will of 1813 that the probate of the former will should have been formerly set aside by order of the court.
4. The defendants do not by their evidence establish their defense of *bona fide* purchasers for value without notice, but the contrary is proved.
5. The plaintiff is not barred by the prescription of ten years as to vacant estates, because here there was no vacant succession, nor by the twenty or thirty years' prescription, because the plaintiff, being a minor until 1826, commenced suit in 1836; and though several of her suits have failed, she has never voluntarily abandoned but has continuously litigated the matter from that time to the present.
6. The decision of this court in 12 How. 537, was not intended to and did not overrule

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the decisions in 6 How. 583, that there had been a lawful marriage between Clark and plaintiff's mother, and that she was the legitimate child of that marriage.

7. The decision in 12 How. is not a bar to this suit, because the suit is between different parties; because plaintiff claims now under the will since established; and because she claims the whole and not a part of the estate of Clark.
8. The paper from the Cathedral of Christ of New Orleans to show the validity of the marriage of plaintiff's mother with Des Grange, prior to her marriage with Clark, is incompetent evidence, and must be rejected according to the Spanish law, which is examined at great length.
9. The plaintiff is the legitimate offspring of a lawful marriage of the testator to her mother.
10. If the mother was in fact incapable of marriage, by reason of a lawful husband then living, still the father being imposed upon and deceived, the child of that marriage is not incapable of taking by will or inheritance from her father under the law of Louisiana.
11. This court is of opinion that the evidence in the case establishes the actual marriage of Daniel Clark, the father of plaintiff, to her mother, and that such marriage was in good faith on both sides, and certainly so on the part of Clark. See *Gaines v. New Orleans*, 6 Wall. 842.

APPEAL from the circuit court for the eastern district of Louisiana.  
The case is stated at great length in the opinion.

*Mr. Cushing* and *Mr. Perin*, for appellant.

*Mr. Janin* and *Mr. Hennen*, for appellee.

\*Mr. Justice WAYNE delivered the opinion of the court. [ \* 556 ]

We will first give some of the facts of this case, that the litigation which has grown out of the wills of Daniel Clark may be correctly understood. Without them it could not be.

They have been the subject of five appeals to this court. This is the sixth. It presents the controversy differently from what it has been before. It also presents points for decision which were not raised in either of the preceding cases. Some of those that were, however, will necessarily be mentioned in this opinion to illustrate their connection with this case. They may be so considered without our coming at all into conflict with any judgment heretofore given concerning the rights of the parties in any antecedent appeal. Our conclusion will differ from one of them on account of testimony in this case which was not in that, but they will not be contradictory; and because we have information in this, concerning a piece of testimony then relied upon, which we shall exclude in this, as inadmissible for any purpose.

Four of the five appeals were decided by this court substantially in favor of Mrs. Gaines. The fifth was adverse, not in anywise excluding the re-examination of the only point then ruled by the use of the same testimony, and that which is new. Considered in connection, both have impressed us with a different impression of

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the status of Mrs. Gaines's legitimacy from that which this court did not then think was sufficiently proved, as we now think it has been. Now she is here with a support which her cases have not had before. She comes with a decision of the supreme court of Louisiana, directing, upon her application, that the will of Daniel Clark, dated at New Orleans, July 13, 1813, as set forth in her petition, should be recognized as his last will and testament, and that it should be recorded and executed as such. In that will her father acknowledges that his beloved Myra, then living in the family of Samuel B. Davis, is his legitimate and only daughter, and bequeaths to her all the estate, real and personal, of which he might die possessed, subject only to the payment of certain legacies named in the will.

Her petition for the probate of that will was first ad-  
[ \* 557 ] dressed \* to the second district court of New Orleans, in which Judge J. N. Lea presided.

After asserting that such a will had been made by her father, its contents were set out as they were recollected by witnesses who had read it, and by other persons to whom it had been shown by the testator, with whom he spoke of it in the last moments of his life, as his last will and testament, in favor of his legitimate daughter, Myra, charging them to take care of it, and telling them it would be found locked up in a trunk, describing it, which he had placed in a certain room in the house.

The will is then stated in the petition to have been olographic ; that is, altogether written and signed in her father's handwriting, with his seal attached to the same ; that immediately after his death diligent searches were made for it, that it could not then be found ; that it has not been since, and that it had been mislaid, lost, or destroyed.

She then declares, that when her father died she was a minor, absent from New Orleans, and living with Samuel B. Davis, to whom and whose lady she had been confided in the year 1812. Judge Lea took cognizance of her petition, proceeded throughout its pendency with great judicial exactness and caution, and, as the whole record shows, with official liberality to every one concerned in resisting the application, without in any particular having denied to the petitioner her rights.

The judge, however, finally decided against the sufficiency of the proof to establish the will according to the requirements of the civil code of Louisiana, but without prejudice to the right of the petitioner to renew her application, with such proofs as might be sufficient to establish an olographic will. She applied for a new

trial, and upon that being denied, solicited an appeal to the supreme court, and that was allowed.

The supreme court tried the case. It differed with Judge Lea as to the proof which was required by the code to establish a lost or destroyed olographic will. It reversed the judgment of the court below, and decreed that the will of Daniel \* Clark, [ \* 558 ] dated on the 13th July, 1813, should be recognized as his last will and testament, and ordered it to be recorded and to be executed as such, it being posterior to the will of May, 1811, which Relf and Chew had presented for probate, under which they had taken possession of the property of Daniel Clark, and had disposed of it to the entire exclusion of Mrs. Gaines from any part of it—an estate shown by the proof in the cause introduced by the defendants, which had been registered or inventoried a short time before Clark's death, at more than seven hundred thousand dollars, in which Clark and Coxe were interested, and an estate exclusively belonging to Clark of two hundred and ninety-six thousand dollars.

But to return to the decree of the supreme court establishing the will of 1813. It must be understood, that its admission of the will to probate does not exclude any one who may desire to contest the will with Mrs. Gaines from doing it in a direct proceeding, or from using any means of defense by way of answer or exception, whenever she shall use the probate as a muniment of title. And the probate does not exclude Relf and Chew, or any other parties having any interest to do so, to oppose the will, when it shall be set up against them, by such defenses as the law will permit in like cases. It was with those qualifications of the probate of the will of 1813 that the case was tried in the court below, and they have been constantly in our minds in the trial of the appeal here.

Upon the rendition of the probate by the supreme court, Mrs. Gaines filed her bill in this case. It shall be fully stated hereafter, with the defenses made against it.

Before doing so, it is due to the merits of the controversy to advert to the decisions of the probate court of the second district of New Orleans, and to that of the supreme court reversing it, more minutely than has been done. Especially, too, as they are coincident with our conclusions upon the testimony regarding the execution by Mr. Clark of his olographic will of 1813, and of the concealment or destruction of it after his death.

The supreme court adopts the prepared statement of the facts of the case as it was made by Judge Lea in the court \*below. Its accuracy has never been denied by any one of [ \* 559 ] the parties interested in this suit, nor by any one else.

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It is as follows: "The petitioner alleges, that on the 16th of August, 1813, the late Daniel Clark, her father, departed this life, having previously, on the 13th of July, executed an olographic will and testament, by which he recognized her as his legitimate and only daughter, and constituted her universal legatee. That the will was wholly written, dated, and signed, in the handwriting of the testator, and was left among his papers at his residence; that after his death search had been made for it, but that it was not found, and that it had been mislaid, lost, or destroyed."

The learned judge then proceeds: "To entitle the petitioner to a judgment recognizing the existence and validity of the will, it is necessary that she should establish affirmatively, by such testimony as the law deems requisite, that Daniel Clark did execute a last will containing testamentary dispositions as set forth in the petition, and that he died without having destroyed or revoked it." "That looking for the testimony which might solve the question, whether such a will had ever been executed or not, a reasonable inquirer would naturally turn for information to those who were most intimate with the deceased in the latter part of his life, and especially, if they could be found, to those who were with him in the last moments of his existence, when the hand of death was upon him, if they had no interest in directing his property into any particular channel, as they might be considered as the best and most reliable witnesses that could be produced; *and it appears to be precisely testimony of that character that the petitioner presents in support of her application.*" Judge Lea then says: "Boisfontaine had business relations with the deceased which brought them into frequent intercourse; and that for the two last days of his life, up to the moment of his death, he was with him. That De la Croix and Bellechasse were intimate personal friends of Clark, and were with him shortly before his death. All of these witnesses concur in stating that Clark said he had made a will posterior to that of 1811,

and De la Croix says, that Clark presented to him in his [ \* 560 ] cabinet a sealed parcel, \* which he declared to be his last will, and that it would be found in a small black trunk. De la Croix also had sworn, shortly after Relf had presented the will of 1811 for probate, that Clark had made a will posterior to that; that the existence of it was known to several persons, and he applied for an order of the court and obtained it, commanding every notary in New Orleans to report if such a document had not been deposited with one of them. Bellechasse and Mrs. Harper swore that they had read the will. The judge then expresses his conclusion to be, *that the legal presumption of the existence of such a*

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*paper had been made out, and that its having been destroyed or revoked by the testator had been satisfactorily rebutted*, and that there was nothing in the record to impeach the credibility of Bellechasse or Mrs. Harper. In these rulings of the district judge the supreme court concurred, and then said, in delivering its opinion, all that they had to do was to inquire whether the will of 1813 had been proved in conformity with the article No. 169 of the old code or 1648 of the new."

Those articles require the testimony of two witnesses when the will shall be presented for probate, who shall declare their recognition of it as having been written wholly by the testator, that it had been signed and sealed by him, and their declaration that they had often seen him write and sign in his lifetime. It was from such a requirement of proof, rejecting secondary testimony altogether, that the district court refused the petition for a probate of the will. Upon such refusal, Mrs. Gaines appealed to the supreme court.

That court said: "That the question of the alleged insufficiency of the proof in the case could only be determined by an inquiry, whether the article was to be pursued *at all times and in all cases*, or whether they were not merely directions when the will itself was presented for probate, and were inapplicable to restrain the court in certain cases, when by reason of the loss or destruction of such an instrument, from taking secondary proof of its contents, as the best which the nature of the case was susceptible."

The court then, by a course of reasoning, supported by several cases from the Louisiana Reports, determined that in the \*event of a will having been destroyed, secondary proof [\* 561] is admissible in Louisiana to prove its contents, and to carry it to probate; that the articles 169 and 1648 contemplate that the will itself should be presented, with the proofs of its execution, to the judge of probate, *when that can be done*; that no one would seriously contend that the calamity of its destruction should deprive the legatee of the right to establish it by secondary evidence; "for was such the law, a reward would be offered to villainy, and it would always be in the power of an unscrupulous heir to prevent the execution of a will." It then meets the assertion directly, that articles 1648 and 1649 of the code *require the production of the will in order that it might be identified by witnesses who recognize it; denies that position*, and affirms that in the absence of such witnesses the evidence concerning an unproduced, destroyed olographic will might be complete. The articles are not negative laws, declaring that no other kind of proof shall be admitted.

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"And it is doubted very much if an olographic will made here had by some accident been destroyed before being legally proved, whether a copy of it, identified by two witnesses, who were able to swear to the genuineness of the original in the manner pointed out by law, would not be considered a sufficient compliance with the provisions of the code." Such, in fact, was the petitioner's case they were considering. Such is the law in analogous cases. The law cannot have been intended to require an impossibility, and to leave a party so circumstanced without a remedy.

The doctrine of the common law is in accordance with the view taken by the supreme court of Louisiana concerning lost deeds and wills. It has been judicially acted upon in English and American cases. It was so in the case of *Dove v. Brown*, 4 Carver, 469. That was a suit upon a lost will devising real estate. By the statute of New York it was necessary to prove the will by three credible witnesses. The will of Brown, as to its execution, was proved by one of the subscribing witnesses. He stated it was executed in the presence of himself, James Mallory, and another person whose name he did not remember, but that he had no doubt of his being [ \* 562 ] a \*credible witness. That, the court said, was all the evidence which could be expected under the circumstances. There are several other cases to the same effect in our American Reports. Jarman, on the Probate of Wills, 1 vol., Perkins's edition, p. 223, says, upon the authority of many cases, note 4: "That if a will, duly executed and not revoked, is lost, destroyed, or mislaid either in the lifetime of the testator, without his knowledge, or, after his death, it may be admitted to probate upon satisfactory proof being given of its having been so lost, destroyed, or mislaid, and also its contents." But to entitle a party to give parol evidence of a will alleged to be destroyed, where there is not conclusive evidence of its absolute destruction, the party must show that he has made diligent search and inquiry after the will in those places where it would most probably be found, if in existence. Under its reasoning, the supreme court of Louisiana, sustained by the authorities in England and in the United States, admitted the olographic will of 1813 of Daniel Clark to probate, declaring also such was the law in Louisiana, and reversed the judgment of the lower court dismissing the petition of Mrs. Gaines.

In virtue of that decision of the supreme court, Mrs. Gaines presents herself to this court, declared by her father to be his legitimate and only daughter, and universal legatee. *We will in another part of this opinion show the legal effect of her father's testamentary declaration.*



We will now state, as briefly as it may be done in such a case, the essential allegations of the bill; the responses of the defendants and their averments; the proofs in support of the complainant's rights, and such of them as are relied upon to defeat them; the legal issues made by the bill and answers, and the points relied upon by both parties in their arguments in this case.

The bill was brought against several defendants, Duncan N. Hennen being one of them. They separated in their answers. Hennen, after giving the claim of title to the property for which he is sued, admits that it was a part of the estate of Daniel Clark, and adopts the answers filed by the other defendants as a part of his defense. The cause was tried with \*respect to [\* 563] him only, and the bill was dismissed by the court below. From that decree Mrs. Gaines appealed to this court.

After specific declarations as to the character in which she sues, and her legal right to do so as the legitimate child of her father and his universal legatee, she acknowledges that he had made a provisional will in the year 1811. That he then made his mother, Mary Clark, his universal legatee, and named Richard Relf and Beverly Chew his executors. That they had presented it to the court for probate, that it had been allowed, and that they, as executors, had taken possession of the entire separate estate of Daniel Clark, and of all such as he claimed in his life in copartnership with Daniel W. Coxe. It is then assumed that the will of 1811 had been revoked by the will of the 13th July, 1813. That Chew was dead; that all the legal power which the probate of the will of 1811 had given to Relf and Chew had expired; that Mary Clark was dead, and that her heirs and legatees reside beyond the jurisdiction of the court.

Mrs. Gaines then states, in the language of equity pleading, the pretenses of the defendants in opposition to her claims. Such as, that Relf and Chew sold them the property as testamentary executors of Daniel Clark under the will of 1811; that they bought for a full consideration, without any notice of the revocation of the will of 1811, or that any other person was interested in the property than Mary Clark; that the titles they had from Relf and Chew could not be invalidated by the revocation of that will, and that the right of action against them for the property in their possession, if complainant had ever had any, were barred by prescription—that is, by the acts of limitation of Louisiana. It is then charged by the complainant that Relf and Chew had no authority to sell the property of Daniel Clark when the sales were made by them. That they had never made an inventory of the decedent's property for the probate court before the sales were made; that the sales were made

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without any legal notice, and for an inadequate consideration. That if Relf and Chew had sold under a power of attorney from Mary Clark, and not as executors, that Mary Clark's power was [ \* 564 ] insufficient in its terms for such purpose; \* that she had no power or rights in the estate of Daniel Clark to give such a power, and that Relf and Chew had not caused themselves to be recognized in a proper court as Mary Clark's attorneys, as they ought to have done, before they could acquire any right to sell any part of the estate of Clark. She then charges that the defendants knew, when they bought the property sued for, that she had applied as early as in the year 1834 to have her father's olographic will of 1813 probated by the proper court at New Orleans; that the defendants knew of all the irregular proceedings and assumptions of Chew and Relf in respect to the estate of her father, and of their sales of it without authority; that the defendants knew, when they bought, of the suits which she had brought to recover her rights in her father's estate; and that her present suit was brought under the probate of the will of 1813 by the supreme court of Louisiana.

Hennen, the defendant, answers for himself, and adopting the answers of the other defendants, states that the property for which he was sued is designated according to a plan made in 1844, as lots 9, 10, 11, on the square comprised between Phillippi, Circus, and Poydras streets; each lot, by English measure, containing 23 feet 11 inches and 2 lines between parallel lines.

The answers of the other defendants make the same admissions as to their titles having been derived from or through Relf and Chew and Mary Clark; admit the property separately claimed by them to have been a part of the estate of Clark; and finally make an averment that Mrs. Gaines had not that civil status by her birth which, under the law of Louisiana, can entitle her to take the property of her father under the will of 1813, though it had been admitted to probate, and that she had been declared in it his legitimate and only daughter. In other words, the defendants have declared that she is an adulterous bastard.

It is proper to state the books and documents which are in evidence in this case.

1. The present record of *Gaines v. Hennen*.

2. The printed record of the suit No. 188, of December [ \* 565 ] term, 1851, in this court, *Gaines v. Relf and Chew*, 12 Howard, 472.

3. The proceedings in the courts of probate entitled *Probate Record*.

4. The commercial account-books kept by Relf and Chew, pro-

fessing to relate to their transactions concerning the estate of Daniel Clark.

This testimony, as it has been enumerated, was brought into the case by agreement of the parties for as much as it might be worth, subject to exceptions by both sides as to its admissibility upon the trial of the cause.

Several immaterial or formal points were made in the argument to defeat the claims set out in this bill. Such as, that the case was not one for equity jurisdiction, but was, *ratione materiae*, exclusively cognizable before the probate court of the 2d district of New Orleans. Next, that Chew and Relf, and Mary Clark, or her heirs, should have been made parties; that the sources of Daniel Clark's title to the property sued for had not been set out in the bill in addition to the manner it had been enumerated. Again: that the probate proceedings in the second district court of New Orleans in 1856 are yet pending and undetermined, and on that account that the same court has exclusive jurisdiction over the estate of Daniel Clark. We have examined these formal objections, and find them to be unsustained by the cases cited in support of them. They are inapplicable to the actual state of the case, and are insufficient to arrest the trial of it upon its merits. The same objections were also urged in the circuit court, but were disregarded, we presume, by the judge, as unsubstantial points of defense. As to the objection that Relf and Chew, and the heirs of Mary Clark, had not been made parties to the bill, we observe it was not necessary to make either of them so. The present is a suit for the recovery of property admitted by the defendants to have been a part of the estate of Daniel Clark. Nothing is sought to be recovered from Chew and Relf. Their executorial functions under the will of 1811 have long since been at an end. Had the bill involved directly their transactions as executors with the complainant, as universal legatee, upon a \*proper showing of that, with a prayer [ \*566 ] to be made parties, the court might have allowed it. But not having done that, the defendants cannot urge, because Relf and Chew have not been made defendants with them, that they should escape from a trial on the rightfulness of their possession of a part of the estate of Clark, as they have admitted it to be; or that they had not acquired it under circumstances from which the law presumes that they had notice of the irregularity of the sale as it was made by Relf and Chew. Nor was it necessary for the heirs of Mary Clark to be made parties; for Mary Clark herself never had any pecuniary responsibilities for the sales of the property of the estate of her son by Relf and Chew, as her power of attorney to

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them upon its face was irregularly executed, and was of itself notice to the defendants that when they bought, the sales had not been made in conformity with the law of Louisiana regulating the sales of the property of a testamentary decedent.

But it was also said in the argument that no claim could be set up by Mrs. Gaines under the will of 1813 until the will of 1811 shall be set aside. Neither the language used by this court in 2 Howard, 651, nor in the decision in 12 Howard, will bear such an interpretation, or admit of such a conclusion. The rulings of courts must be considered always in reference to the subject-matter of litigation and the attitude of parties in relation to the point under discussion. And it will often be the case, as it is now, that counsel will use an illustration for a judicial ruling, or words correctly used when they were written as applicable to a different state of things. When this court said, in 12 Howard, 651, that the will of 1813 cannot be set up without the destruction of the will of 1811, it was with reference to the existing fact that the latter had been duly proved, and that it stood as a title to the succession of the estate of Daniel Clark, and that the will of 1813 had not then been proved before a court of probate, and on that account could not be set up in chancery as an inconsistent and opposing succession to the estate while the probate of the will of 1811 was standing in full force.

And when Mr. Justice McLean, speaking for the court, 2 [ \* 567 ] Howard, 647, says, "she (meaning \*Mrs. Gaines, then the complainant) must ask for the probate of the will of 1813, and a revocation of the other will of 1811," adding "for no probate can stand while a previous one is unrevoked," it is plain that the meaning was, as we now say it is, when a court recalls the probate of a will, substituting the probate of another will by the same testator made posterior to the first, that the former becomes inoperative, and the second is that under which the estate is to be administered, without any formal declaration by the court that the first was annulled, and it makes no difference that a part of the estate has been administered under the first probate. The unadministered must be done under the second. Courts of probate may for cause recall or annul testamentary letters, but they can neither destroy nor revoke wills; though they may and often have declared that a posterior will of a testator shall be recognized in the place of a prior will which had been proved, when it was not known to the court that the testator had revoked it. Such is exactly this case. The supreme court decreed that the will of Daniel Clark, dated New Orleans, July 13, 1813, as set forth in the plaintiff's petition, should be recognized as his last will and testament, and the

same was ordered to be recorded and executed as such, *with the declaration*, that admitting the will to probate does not conclude any one who may desire to contest the will with the applicant in a direct action. The decree of the court in that particular is the law of the case.

It was also urged that the defendant and those under whom he claims were purchasers for a valuable consideration without notice, and are therefore in equity protected against the claims of the complainant. It is a good defense when it shall be proved as a matter of fact. But in this instance it is not only disproved by testimony introduced by the defendants, but by admissions in their answers, as shall be shown hereafter in this opinion. In our opinion the objection has no standing in this case, though the argument from which the counsel admitted he had borrowed it is a very good one in its proper place.

We shall now examine the case upon the more serious points \*made in opposition to Mrs. Gaines by the learned [ \* 568 ] counsel, Mr. Janin.

The first was, that her claim was barred by prescription. The prescription relied upon by the defendants is that of ten years against one *claiming a vacant estate*, twenty years to prescribe a title, and thirty years to bar the faculty of accepting a succession or the estate of a deceased person. There being no vacant succession in this case, the ten years' prescription does not apply, and the prescription of twenty years does not exist; for Mrs. Gaines did not attain her majority until June or July, eighteen hundred and twenty-six, and her suit for the probate of the will made by her father on the 13th of July, 1813, *was instituted in 1834*. When her petition for that purpose was *dismissed in 1836*, her first bill was filed in a month or two afterwards. From that time there was a legal interruption of the prescription of twenty years, which the defendants have pleaded and now rely upon. In fact, they recognize the interruption in their answers. In their averment of their having had peaceable possession of the property sued for since they bought it, they add, "that they had never been disturbed in respect to it," *except by an abortive attempt of the complainant and her husband to recover it by their bill filed in 1836*. New Record, 47. We find them also in their answer (New Record, 54) admitting that such a suit as complainant refers to in her present bill had been instituted by her and her husband in 1836, and that the object of it *was the recovery of the "identical property" now in controversy*. New Record, 56, 57. It is also admitted in the answer, that the suit of the complainant in the probate court to annul the probate of the

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will of 1811, and to set up that of 1813, was brought *on the 18th June, 1834*. These admissions are decisive that the complainant claimed the inheritance as early as that date, and that the prescription which had begun to run had been legally interrupted on the 28th July, 1836, the date of her first bill.

By the article of the code, 3484, a legal interruption of a prescription takes place where the possessor has been called to appear before a court of justice, either on account of the property or the possession, and the prescription is interrupted by [ \* 569 ] \* such demand, whether the suit has been brought before a court of competent jurisdiction or not.

The weight of authority upon the construction of that article of the code is, that it contemplates a voluntary, intentional, and active abandonment of the suit, in order to restore the running of a right of prescription. In the case of *Wilson v. Marshall*, 10th Annual, 331, the court said the plaintiff did not dismiss the suit, or consent to the dismissal. She lived in a remote part of the State, and the mere absence of herself and counsel at a term of the court when her case was called is insufficient, without other evidence, to convict her of having abandoned her demand. *Pratt v. Peck*, curator, 3 Lea R. 282; *Dunn v. Kenney*, 11 Rob. 250; *Roswood v. Duvall*, 7 Annual, 528; *Mechanic and Traders' Bank v. Theatt*, 8 Annual, 469.

After the interruption of the prescription by the filing of the bill by the complainant, the defendants could no longer claim to be in possession *in good faith*, as that is defined in the civil code. In article 3415 the possessor in bad faith is he who possesses as master, but who assumes this quality when he well knows that he has no title to the thing, *or that his title is vicious and defective*. The possessor must not only not be in bad faith, but in the positive belief that he is the true owner, and if he doubts the validity of his title, his possession is not the basis of prescription. *Troplong Prescription*, vol. 2, p. 451, No. 927; *Ib.* p. 444, No. 918; *Ib.* p. 442, 915. The plea of prescription is not available in this case.

But the defendants go further, and insinuate that their possession of the property, though beginning with the executors, Relf and Chew, continued afterwards under Mary Clark, whose power of attorney to them authorized them to sell the estate of Clark.

When Relf and Chew proved the will of 1811, they received the estate of Clark as executors, with a right of detainer for one year, and for as long afterwards as the court of probate might permit upon their application, showing cause for the delay or the extension of a longer time. They did receive such an extension for

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three years upon their representation \*that the nature of [ \* 570 ] the estate, the difficulty of the time, and the ample sufficiency of the estate to pay all of its debts, would enable them by the delay to accomplish that result. The creditors were called upon to meet to consider the proposition. They assented to it. But the executors never fulfilled the arrangement, either for the benefit of the creditors or for the legatees under the will of 1811. Nor did they ever make any return to the court of probates of their transactions relative to Clark's estate until 1836, after the complainant had sued them, and then without vouchers to homologate their receipts, expenditures, and payments, except for a small part. Shortly after the application for an extension of time, in the year 1813, they applied for a power of attorney from Mary Clark, who had been named in the will of 1811 as universal legatee, to authorize them to sell the estate in her behalf. The power was given; and under it, without any notice to the court of probate, which ought to have been given, and the power filed in it, they continued, as the testimony in this case shows, to act as executors, and to dispose of the estate of Clark, both real and personal, property in co-partnership, and other property separately belonging to Clark, without ever having received any permission to do so from the court of probate, and that should have been obtained, as Mary Clark had not been acknowledged by that court as the universal legatee of Clark. It may be that they mistook their powers in doing so; but they received the estate of Clark in a fiduciary character, to be accounted for to the legatees and creditors, according to their rights under the law of Louisiana, and for that they are responsible. Besides, the power from Mary Clark was given to them as executors, that she might have the benefit of those responsibilities for the faithful execution of the trust that they were under by the law of Louisiana as executors. They paid debts, received moneys, sold property, and acted throughout as if they were not responsible to the court from which they derived their testamentary letters or to Mary Clark, and, as the record in this case shows, without sustaining their transactions by vouchers of any kind.

Nothing is better settled by the decisions of its courts in \*Louisiana than "that an extra judicial statement by an [ \* 571 ] executor, that he believes the debt to be due by the estate, does not bind the heir, nor is the heir bound by the approval of a court as to such a claim, if it be made *ex parte*." 4 Lou. R. 382. Again: that the admission of the genuineness of the signature to vouchers filed by the curator of a succession in support of his account, dispenses with any other proof of the payment claimed;

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but when such payments are made *without an order of the court*, the curator must show that the debts were really due by the succession, or he will not be entitled to credit for the amounts so paid. *Miller v. Miller*, 12 R. A receipt given to an administrator for the payment of an account is not evidence that the account was due, if the fact of being due is disputed. *Moore v. Thebadeaux*, 4th Annual, 74. So an administrator who renders an account is bound to establish the items of it by evidence, and may be held to strict proof by the parties interested without a formal opposition on their part. *Succession of Lea*, 4th Annual, 579. The accounts of Relf and Chew were put in evidence by the defendants, and they were used to show, among other things, that they were authorized to sell the estate of Clark as they did, and that they were auxiliary for the establishment of the defendant's plea of prescription. Such, however, is not our opinion, and but for the use made of them, we should not have noticed them at all, not thinking that they are put in issue by the bill of the complainant, or the answer of the defendants, particularly as Relf and Chew are not parties to this proceeding.

We will now proceed to the consideration of that point made in the argument by the counsel of the defendant, but more particularly representing the city of New Orleans, as he said he did.

It was that complainant's suit could not be maintained, because it was *res adjudicata* by this court in its judgment in the case of *Gaines v. Relf and Chew*, in 12 Howard, 506.

We do not think so. That case is misunderstood by the learned counsel. Then the parties went to trial upon the demand of Mrs.

Gaines for one-half of her father's estate, as the donee of her [\* 572] mother, his widow, and as *forced heir of her father* \* by the law of Louisiana *for four-fifths of another half of his estate*.

Her bill then was brought in consequence of this court having decided, in 6 Howard, 550, that there had been a lawful marriage solemnized in good faith between them in Philadelphia. That case was tried upon the same evidence upon which the appeal was determined in 12 Howard, with the exception of what is miscalled an ecclesiastical record from the Cathedral church in New Orleans, of which we shall have much to say hereafter. Besides having decided, in 6 Howard, that there had been a lawful marriage between the complainant's father and mother, this court decreed that Mrs. Gaines was the lawful and only issue of the marriage; that at the time of her father's death she was his only legitimate child, and was exclusively invested with *the character of his forced heir*, and as such was entitled to its rights in his estate.



The judgment in that case has never been overruled or impaired by this court. It certainly was not intended to be by the case in 12 Howard, for the report in that case shows, from the number of justices who sat upon its trial, and their decision as to the judgment then to be rendered, that the majority of them did not intend to overrule the decree in 6 Howard. It was recognized again as still in force by a majority of the judges who sat in this case in our consultation. The defendant in the case of 1851, 12 Howard, 537, admitted that such a decree was rendered, denying, however, that it was conclusive upon or that it ought to affect their right; and if it could do so, it ought not to have such an effect in that instance, averring the same as a matter of defense, that the decree was brought about and procured by imposition, combination, and fraud, between the complainants and Charles Patterson. That it should not be regarded in a court of justice for any purpose whatever, and that it had been consented to by Patterson to enable the complainant to plead the same as *res judicata* upon points in litigation not honestly contested. Mr. Janin was mistaken when he said that the decree in 6 Howard, 583, had been reviewed in the case of 12 Howard, 537, meaning thereby that it had been overruled. It was not only not so, but one of \*the justices who assented to [\* 573] the judgment in 6 Howard, which declares that there had been a valid marriage between Daniel Clark and Zulime Carriere, and that she was the legitimate child of that marriage, would not assent to its being done when he concurred in the decree in 12 Howard.

The decision in 12 Howard does not, either in terms or inferentially, assert that no marriage had ever taken place between Daniel Clark and the complainant's mother. The issue in that case was, that at the time of the complainant's birth, her mother was the lawful wife of another man, namely, of Jerome Des Grange.

It was, therefore, essential to the defendants to get rid of the decree which had affirmed the legitimacy of Mrs. Gaines and of the marriage of her father and mother, and it was attempted by a contrivance as extraordinary in its beginning as it was abortive in its result. We will show what it was from the record, not only on account of its anomalous character, but because it is unexampled in jurisprudence.

After having asserted that the decree in 6 Howard had been obtained by the fraud of Patterson and General Gaines, thus impeaching the credibility of Patterson in advance, the defendants, Relf and Chew, introduced him as their witness, (Old Record, pp. 590, 591, 592, 593, 594,) and he was examined by their counsel,

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first as to a suit in which Mrs. Gaines had recovered a house and lot from him. After stating his age to be about seventy, his answer was: "It was for a house and lot on which I resided when the suit was brought; I still reside in that house and lot, and have done so ever since the suit was brought. Mrs. Gaines succeeded in the suit, according to the judgment of the court. That house and lot belongs to her, but they told me they would not take it from me. General Gaines and his wife gave me in writing under their hands that they would not take the property from me; that he would make my title good. The property has always been assessed as mine, and I have always paid the taxes on it. I paid most of the costs, but they paid me again—that is, General and Mrs. Gaines. There was an understanding between us that they would pay the [ \* 574 ] costs, even should the suit be decided \*against me. They made the same offer to Judge Martin." In his cross-examination, witness said he had made the best effort in his power, with the aid of able counsel, to defeat Mrs. Gaines in her suit. The cross-examination was resumed the next day, 20th June, 1849. Patterson was asked to look upon a document marked A, and to state if he knew the handwriting of the late General Gaines; whether the signature to it was not his; whether he had received that, or a communication of which that was a copy, prior to withdrawing his dilatory pleading in the case of *Gaines v. Relf and Chew et. al.* and filing your answer to the merits of that case. The defendants, by counsel, protested against the paper being put into the record, on the ground that it contained false, malicious, and gratuitous imputations against parties in nowise connected with the suit. Witness then answered, that was the signature of General Gaines; he had often received letters from him, and seen him write, and that he had received two or three communications, of which that was a copy, before he withdrew his dilatory pleadings in that case, and answering to the merits. A letter was then handed to witness, marked B. He answered, the body of it was the handwriting of General Gaines; was present when he wrote it, and saw both General and Mrs. Gaines sign it. Then the following question was put to the witness: "At the trial of your cause with Gaines and wife, did not your counsel make a request of the counsel of Mrs. Gaines to be permitted to introduce the record from the probate court of New Orleans of all the proceedings of Mrs. Gaines in the prosecution of her rights in that court?" Witness answers: "Yes, sir; her counsel objected to that, and I applied to General and Mrs. Gaines to introduce the record. They replied to me to get all the evidence possible, the stronger the better. General Gaines re-

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marked, it would be more glorious to have it as strong as possible. I then caused it to be introduced." Here the cross-examination of the witness was closed. The counsel for the defendants objected to the foregoing testimony, and especially to that part which relates the conversations of the complainants with the witness, and that part which details what was done in *a judicial proceeding*, \*on the grounds, among others, that it is incompetent for [\* 575] the complainants to make evidence for themselves, and that what had been done in *judicial proceedings should be shown by the record*. And from that gentleman's accurate knowledge of his profession, indicated as it has been by the two lines just underscored, may we not say in the zeal of professional advocacy that the best of us may forget it? for what has been his interrogation of Patterson but an attempt to invalidate a judgment against him by the testimony of the most interested party to have it annulled, without having made any appeal to the record of that judgment? And Patterson was the defendant's witness.

But we have not yet done with this attempt to prejudice the rights of Mrs. Gaines by suggestions that her suit with Patterson was pretensive and fraudulent, and to extract from him some proof or confession of his own infamy.

After the examination in chief and the cross-examination had been completed and signed by the witness, and both counsel had announced that they had concluded their examination, the counsel for the defendant made another objection to the cross-examination of Mr. Patterson, insisting that it should be considered as his examination in chief by the complainant, to which the defendants had the right of cross-examination; and the witness was recalled on the following day for that purpose. Every effort was then made by many questions to extract from him some inconsistency with his first examination without success. But fortunately for his own character he removes the imputation of fraud and combination between himself and General Gaines, to give to the latter the benefit of a collusive judgment in the circuit court against himself, by having, in his answer to one of the questions, alluded again to the documents A and B, which are now presented as conclusive against the charge that there was ever any combination between them, by trick or by contrivance, or by any deceitful agreement or compact, for a suit to be brought by one against the other to defraud any third person of his right. See Old Record, pages 1018 for Document A, and 819 for letter B. And when the witness was asked if \*he had not been particularly requested by the General [\* 576] and Mrs. Gaines to use his best exertions, with the aid of

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the best counsel he could employ, to make every defense in his power to this suit of which it was susceptible, he answered: Yes, and I did so; and I considered the agreement with General and Mrs. Gaines as an act of liberality on their part, growing out of a desire to come to a speedy trial with some one or more of the defendants on the merits of the case.

It was an indiscreet arrangement between General Gaines and Mr. Patterson, not to be tolerated in a court of justice, but not one of intentional deception in contemplation of any undue advantage. And it would never have been made by Relf and Chew, in their answer to the subsequent bill of the complainant against them, had they not been erroneously advised that the decree in sixth Howard, establishing the marriage of Clark and Zulime Carriere, and the legitimacy of Mrs. Gaines, might be used as *res judicata* against the defendants in the suit of the 20th January, 1849, and as they now attempt to make the decision in that case a *res judicata* against the claims of Mrs. Gaines in this which we are now deciding.

But what was decided in the case in 12 Howard? It is stated, in the language of the decision, "that the first and most important of the issues presented is that of the legitimacy of Mrs. Gaines." Then are stated the pleadings under which the issue was made. It shall be given in the language of the decision: "She (Mrs. Gaines) alleges that her father, Daniel Clark, was married to Zulime Nee Carriere, in the city of Philadelphia, in the year 1802 or 1803, and that she is the legitimate and only legitimate offspring of that marriage. The defendants deny that Daniel Clark was married to Zulime at the time and place alleged, or at any other time and place. And they further *aver* that, at the time the marriage is alleged to have taken place, the said Zulime was the lawful wife of one Jerome des Grange. If the mother of the complainant was the lawful wife of Jerome des Grange at the time Zulime is alleged to have married with Clark, then the marriage is merely void, and it is immaterial whether it did or did not take place. And [577 \*] *the first question we propose to examine is as to the \*fact whether Zulime was Des Grange's lawful wife in 1802 or 1803.*" Then follows the recital of the marriage between Des Grange and Zulime, with the record of it, on the 2d December, 1794, admitted on the part of Mrs. Gaines. To rebut and overcome the established and admitted fact of that marriage, the complainant introduced witnesses to prove, "that previous to De Grange's marriage with Zulime he had lawfully married another woman, who was living when he married Zulime, and was still

his wife, and therefore the second marriage was void, *and this issue we are called on to try.*"

Then it is said that "the marriage with Des Grange having been proved, it was established as *prima facie* true that Zulime was not the lawful wife of Clark, and the onus of proving that Des Grange had a former wife living when he married Zulime was imposed on the complainant; she was bound to prove the affirmative fact that Des Grange had committed bigamy." Then follows the recital of the testimony of the complainant to prove that Des Grange became a bigamist by his marriage with her mother. And then, to "meet and rebut this evidence, the defendants introduced from the records of the Cathedral church of the diocese, to which New Orleans belonged at that period, an ecclesiastical proceeding against Des Grange for bigamy, which respondents insist is the same to which complainants refer." It is set out in full in the decision, beginning at page 513 in 12 Howard, extending to 519, inclusive. Then the rebutting testimony of Daniel W. Coxe, for a long time a copartner in business with Clark, was introduced. He states an antecedent connection between Clark and Zulime to the time of their alleged marriage, with a confidential letter to him, which was delivered by Zulime, in which it was stated that she was pregnant, and that he, Clark, was the father of the child; further, requesting that he would put her under the care of a respectable physician, and furnish her with money during her confinement and stay in Philadelphia; and further, that she gave birth to a child, who was Caroline Barnes, who before her marriage went by the name of Caroline Clark, and that what has been related happened in 1802; and he further states that Clark was not in Philadelphia in 1803, having \*gone to Europe in August, 1802, and having returned to [ \* 578 ] New Orleans early in 1803. A letter from Des Grange was introduced, dated at Bordeaux, July, 1801; also a suit for alimony brought by Zulime against Des Grange, in 1805, which will be further noticed in the opinion. Then it is said: "This is substantially the evidence on both sides on which the question depends, *whether Des Grange was or was not guilty of bigamy* in marrying Maria Julia Nee Carriere in 1794. Objections are taken to several portions of this evidence, and especially as respects the record of the suit against Des Grange for bigamy in the ecclesiastical court." And though this is followed in the decision by a suggestive, able, and searching commentary upon the objections made to the testimony of the defendants, and upon that of the complainant, by connection and comparison of the two, and upon what was deemed the law of the case, all of it relates exclusively to disprove

that Des Grange was married, and had a wife alive when he married Zulime.

The announced conclusions in that case, which were seven in number, (12 Howard, 539,) show it to have been so. It was "the question decided," and was said "concludes this controversy." The factum of marriage between Clark and Zulime, and the legitimacy of Mrs. Gaines, as both had been decreed by this court, were not then disaffirmed, either directly or inferentially, and all that was said about it is, "that the decree of this court in Patterson's case does not affect these defendants, for two reasons: 1. Because they were no parties to it; and, 2d, because it was no earnest controversy.

It is our opinion that the decision made in the case in 12 Howard was not intended to reverse the decree in 6 Howard, and that it cannot be so applied as *res judicata* to the case we are now trying.

We will now show the difference as to the character in which Mrs. Gaines then sued and that in which she now does, in connection with the law of Louisiana, as to what constitutes a *res judicata*, and what does not.

In the first, her demand was for one-half, and four-fifths of another half of the property owned by her father when he died. She then claimed as the donee of her mother to the one-half, [ \* 579 ] \*and as *forced heir of her father* to four-fifths of another half of his estate. Now she claims as universal legatee and legitimate child of her father, under his will of the 13th July, 1813, which has been admitted to probate by the supreme court of Louisiana, and ordered to be executed as such.

The difference between the two cases is just that which the law of Louisiana will not permit the decision in the first to be pleaded against her in this case as a *res judicata*.

It is declared in the article 2265 of the Louisiana code, "that the authority of the thing adjudged takes place only with respect to what was *the object of the judgment*. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be made between the same parties, and formed by them against each *other in the same quality*."

The case in 12 Howard and that now under our consideration are dissimilar as to parties and things sued for, or what is called "the object of the judgment." The suit now is not between Mrs. Gaines and Relf and Chew, but between herself as complainant, and Duncan N. Hennen as defendant. Nothing was said in the first suit of the claim of Mrs. Gaines under the will upon which she now sues, as in every particular detailed in the article 2265. There are dif-

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ferences between her present cause of action and that formerly made, and the demand now made is not between the same parties, or formed against each in the same quality. And, therefore, upon well-settled principles coincident with the article 2265, and also independent of it, nothing that was said or done in the case in 12 Howard can prejudice her claim as she now makes it. We give the authorities for that position, that they may be consulted, without being able, for want of time, to show their application by extracts. 24 Wend. 585; 14 Peters, 406; 1 Dana, 109; 3 Wend. 27; 2 Sim. and Stuart, 464; 6 Wheaton, 109; 7 Cranch, 565; 3 East. 346; 4 Gill and Johnson, 360; Preston v. Slocumb, 10 Reports, (Louisiana,) 361; 1 Annual, 42; 3 Annual, 530; 10 Annual, 682; 3 Martin, 465; 7 Martin, 727; 7 Reports, 46. And the precise point was ruled in Burt v. Steinberger, 4 Cowen, 563-4, "that the defendant might have \* shown, if he could, that [ \* 580 ] he had acquired a title since the former trial, or any title other than that which had been passed upon in the former trial."

We are fully satisfied from the article 2265, and the cases cited from the Louisiana courts, and from the English and American reports, that the objection of *res judicata*, as made against the recovery of the complainant in this case, is without any foundation in law.

We have now reached the last and most important objection made against the complainant's recovery. But before discussing it directly, we must dispose of the ecclesiastical record, which was much relied upon in the argument to repel the evidence of her legitimacy, and to establish the fact that the marriage between her father and mother was unlawful, from her having been then the lawful wife of Jerome Des Grange; in other words, that Des Grange did not commit bigamy when he married her, by which she was not released from her conjugal relations with him, and had not the right to marry any other man who was free to contract marriage.

We have seen that exceptions were taken to the admissibility of that record as evidence when it was first presented by the defendant's counsel in the case before the circuit court. They were renewed upon the appeal here. They were continued when the defendants introduced it again into this case, and it is necessarily before us to be determined as a question of law, whatever may have been thought of it heretofore, either by judges or by counsel.

Our first remark concerning it is, admitting that the canon law, as sanctioned by the church of Rome, was in force in Louisiana at the time of this procedure, it was a mere assumption, without authority in its beginning, tyrannous against the object of it, and irregular in its action. It was a nullity, *coram non judice*, before

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the canon who issued it. The presbyter canon who assumed to do so was not vicar general or governor of the bishopric of Louisiana and the two Floridas. He was only the presbyter canon of a vacant see, without delegation by commission or deputation from a bishop to represent him in his spiritual offices and powers.

[ \*581 ] He had no canonical power \* in his pastoral charge of a particular church and congregation to originate a prosecution for bigamy. Nor would either archbishop or bishop, had there been either then in Louisiana, have ventured to do so in the condition at that time of the ecclesiastical practice and royal ordinances of Spain, especially in their application to its foreign possessions. And such a procedure was a direct violation of the *Instituciones de derecho canonico Americano* por El Rev. Sr. D. Justo Donoso.

The inquisition, as it had existed for more than a hundred years in France and Italy, was introduced into Spain by Gregory IX, about the middle of the 13th century. It encountered no opposition there. It at first attained a prevalence and extension of power larger than it had exercised before, and was on the increase when Spain became an united kingdom under Ferdinand and Isabella. They were authorized by the bull of Sextus IV to establish the inquisition in their states. And then it was invested with jurisdiction of heresies of all kinds, and also of sorcery, Judaism, Mahomedanism, offenses against nature, and polygamy, with power to punish them, from temporary confinement and severe penance to the *san benito* and the *auto de fé*. Before that time the inquisition had exercised a capricious jurisdiction, both as to persons and creeds. *Encyclopædia Britannica*, 8 edition, 11 vol. art. Inqui. page 386. In its new form it met with opposition. Attempts were made in Castile and Arragon to repulse its authority and to restrain the holy office, as it encroached upon government and deprived the people of many of their ancient rights and privileges. Its power, however, became triumphant, and so aggressive upon the royal authority that it was resisted by the kings of Spain, as well in the kingdom as in its foreign possessions.

It cannot be expected that we shall enter chronologically into such a detail. We will verify what has just been said by distinct citations from the laws of Spain and royal ordinances.

The first of these ordinances which we shall cite is that of Charles I of Spain, (5 of Germany,) issued at Madrid on the 21st September, 1530; *Leyes de Indias*, tom. 1, livre 1, titulo 10, page 48.

Charles had been about twelve years in Spain. The [ \*582 ] mines \* of the west had begun to throw their treasures into Spain. They were essential to the accomplishment of



the political and military designs of the king, and to his necessities also. Complaints were constantly being made of the rigors of the inquisition upon the Indians in his western dominions, and upon his subjects who had emigrated to them in large numbers in pursuit of gold. It was said but for such causes that the yield of gold would have been larger. The king determined to restrain the holy office in its jurisdiction, and issued his decree of September 21, 1530. We give Judge Foulhouse's translation of it: "We order the attorneys, police officers, sheriffs, and other ministerial officers *of the prelates and ecclesiastical judges of our West Indies, islands, and continents along the ocean*, not to arrest any layman, or issue any execution against him or his property, for any reason whatever; and we order all clerks and notaries not to sign, seal, or take any deposition with regard to the same, or for any reason thereto relating; and whenever ecclesiastical judges shall judge necessary to have a person imprisoned or an execution issued, they shall pray for the royal aid of our secular justices, who shall grant it according to law. And all vicars and ecclesiastical judges shall observe this order and comply with it, as is prescribed by this law, under penalty of losing the status and privileges which they enjoy in the Indies, and of being there held as foreigners and strangers to the same. And any of said attorneys, police officers, sheriffs, clerks, and notaries, and any other who do the contrary, shall be forever exiled from all of our Indies, and all of their goods shall be confiscated for the profit of our royal treasures; and we hereby direct and empower all of our justices, and all of our subjects and settlers, not to consent thereto, and let the attorneys or executing officers do so, too; and we order that this ordinance be observed, any contrary custom notwithstanding."

The ordinance of Charles was followed by another of his son, Philip 2, which declared, "that whenever in our royal courts of the Indies the aid of the secular arm shall be asked by the prelates and ecclesiastical judges, either for an arrest or for execution, the demand shall be by petition, and not by \*requisi- [ \* 583 ] tion." These royal ordinances will be found in the recopilacion in the Indies. They were declared by a law of Don Carlos 2, one hundred and thirty years after they were promulgated, to be existing laws, on the 18th May, 1680. See the law to that effect preceding the Titulo Primero in Libro Primero, fo. 1, Recopilacion Leyes de Indies. They have had their places in every edition of the recopilacion since. Indeed, they were never abrogated, and were in practical operation in all of the dominions of Spain in America until she lost them.

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They establish satisfactorily that the presbyter canon, Hasset, when he issued his prosecution against Jerome Des Grange for bigamy and imprisoned him, that he did so contrary to law, and that his whole proceeding in the matter was a nullity, and, as such inadmissible as record evidence in a secular or ecclesiastical court. *Recopilacion de Leyes de los reynos de las Indias*; en Madrid, por Andres, Ortega, ano. de 1774; tercera edicion, page 48.

But there are other royal ordinances establishing what has just been said in respect to the nullity of that procedure, because they bear directly upon the incapacity of the ecclesiastical power to originate a prosecution for bigamy.

The first of them which we shall cite is a cedula of March 19, 1754, in which it was declared that polygamy was a crime of a mixed nature, in which the royal tribunals may take cognizance in the first instance, with this qualification, that if the inquisition wishes to punish the accused for suspicion of heresy, he shall be remitted to it after having suffered the legal penalties. *Leyes de Indias*, c. 1, tit. 19, not. 2.

But this cedula was modified in 1761 by Charles 3, leaving to the inquisition cognizance of this crime, and reserving only to the secular courts the power to take informations, and to arrest the accused in order to deliver him to the inquisition. This concession was made by the king, who ascended the throne at a period peculiarly critical, requiring the conciliation of every agency in his new kingdom to meet the pressure of political difficulties, and to allay discontents and suspicions against himself, which subsequently became a revolt. He was \*charged with being opposed to the inquisition, from having been on the throne of Naples for several years, where it had never been introduced, the people having always resisted its establishment over them.

But the prudence of the king did not restrain the inquisition from the assertion of its jurisdiction in that and in other particulars offensively to the ancient usages and rights of Spain. In its eagerness to extend its power, it invaded the royal authority, and stretched its jurisdiction to every cause in the slightest degree connected with ecclesiastical discipline or punishment. The king resisted it, and he was soon furnished with a cause for doing so. The inquisition having taken from the auditor of the army a process instituted against an old veteran who was accused of bigamy, the jealousy which the king in fact entertained against the inquisition was revived. His vigilant minister, d'Aranda, used it to obtain a royal decree, ordering the process against bigamy to be restored to the civil or secular courts. It also enjoined upon the inquisition

to abstain from interfering with the proceedings of the secular courts; required it to confine itself to its proper functions in the prosecution of apostacy and heresy; forbade it to "defame with imprisonment his vassals before they were *previously and publicly convicted*," and commands the inquisitor general to require the inquisitors to observe the laws of the kingdom in cases of that kind; and further, all the king's royal tribunals, judges, and justices, were ordered to keep and obey the decree, and to punish those who should violate it in any manner whatever. This was the decree of Charles 3, of the fifth of February, 1770, cited by Judge Foulhouse in his opinion upon the nullity of the proceedings against Jerome Des Grange, by the assumption of the presbyter canon, Hasset, of the Cathedral church of New Orleans. For the royal decree of the 5th February, 1770, see original, the *Novissima Recopilacion*, vol. 5, p. 425; Coxe's *Memoirs of the Kings of Spain*, 3 vol., ch. 57, page 367.

Thus stood the jurisdiction of the inquisition in respect to the crime of bigamy restrained by royal authority for six years. Complaints were then made of the uncertainty of the royal \*cedule of the 5th February, 1770, especially in respect [\* 585] to the extent of its interference with the power of the holy office to inquire for discipline and for punishment into cases of polygamy. The king was induced to call a *toro* or council, to discuss the different relations and boundaries between the secular and ecclesiastical cognizances of the crime of bigamy. The result of that council was communicated to the king on the 6th September, 1777. It was that a majority of it had come to a conclusion, that by the act of marrying a second time whilst the first wife was alive, the person who does so violates the faith due to the marriage contract; that he deceives the second wife and wrongs the first; inverts the order of succession, and of the legitimacy established by the laws, *inasmuch as his fraud makes the children of the second matrimony, though truly adulterine, legitimate, and capable to inherit from their parents* on account of the good faith of their mother in contracting that marriage; further, that the kingdoms of Spain assembled in *cortes* had established penalties against the crime of bigamy, commanding that they should be imposed by the royal courts, and declaring that they should not be embarrassed in their cognizance of the offense; also, that he who marries a second time, his first wife being living, offends the ordinary jurisdiction in maliciously deceiving the curate to assist at a null marriage, and that on that account there is ecclesiastical jurisdiction to inquire into the validity or nullity of mar-

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riages; but that it was to be done without embarrassing the royal courts in their cognizance of the offense. It was then said that such persons may also incur the crime of a false profession of the sacraments, which was exclusively within the jurisdiction of the holy office; which was, however, to be exercised reciprocally by it and the secular courts, to prevent the repetition of the offense by the imposition of penalties which belong to each, and by the delivery of prisoners from one to the other to be tried. Upon the foregoing report being made to the king, he gave a royal order to be communicated to the inquisitor general, that by his cedula of the 5th February, 1770, the holy office was not impeded in the cognizance of the crimes of heresy and apostacy, and of persons declared subject to \*suspicion of bad conscience by the violation of apostolic bulls which had been received and enforced in Spain with royal consent, in those cases in which the jurisdiction of them was in the holy office. This royal resolution was followed by another decree, remitted to the alcaidro and to the chancery and audiences of the kingdom on the 20th February, 1782. *Novissima Recopilacion*, page 425 of vol. 5, Ley. 10; note 1, tercera edicion, Madrid, por Andres, Ortega, 1774.

The result of the council, however, of which we have just given the particulars, did not satisfy the grand inquisitor. Attempts were made to reassert his assumed jurisdiction in all its plenitude, both in Spain and its foreign dominions. The holy office was on its decline. This was its last great struggle for existence. The king had long resided in Naples, where the inquisition was regarded with the same horror as among Protestants. Though partaking of the same feeling, he was too prudent to trample on the prejudices and opinions of his Spanish subjects, or to make a direct attack against that great engine of ecclesiastical authority. He had witnessed the danger of precipitate reforms and of shocking national prejudices in matters however beneficial. He adopted in his long reign the only maxim which could be pursued with safety, and perhaps the only means to produce the intended effect. He endeavored to check the oppressions, to soften the rigors, and to circumscribe the authority of the inquisition, and thus prepared the way for time and circumstances to produce its total abolition. In the pursuit of this design he was seconded by the energy and liberal principles of his minister, Florida Blanca. The principal restrictions of De Aranda were gradually revived; and in 1784 the celebrated decree was issued, which partially subjected the proceedings of the holy office to the cognizance of the sovereign. It was ordered that no grandee, minister, or any person in civil or military service of the

crown, should be subjected to a process without the approbation of the king. Thenceforth this formidable tribunal became feeble in its operations, and was suffered only to give such displays of its authority as were calculated to weaken the public veneration. Coxe's *Memoirs of the Kings of Spain*, vol. 3, \*pages [ \* 587 ] 526, 527, &c. Under the reign of the son of Charles, the prince of Asturias, his successor in Spain and the Indies, "the inquisition received a still heavier shock, and before the late revolution it had become a mere tribunal of police, to arrest the progress of political, rather than of religious heresy." It was finally abolished in Spain in 1808.

It appears, then, from the royal ordinances which have been cited, that from the time of the introduction of the inquisition into Spain the extent and manner for the exercise of its jurisdiction were subject to the regulations of royal ordinances; that it had been so restrained in polygamous cases, its jurisdiction in them having been confined to inquiries connected with the validity or nullity of marriages, and to the infliction of penances for the violation of the ecclesiastical law in respect to them. It had not the power to initiate a process in a case of bigamy for the punishment of it but in subjection to the royal ordinances, or to institute in the Indies, after those ordinances were passed, an inquisitorial tribunal concerning it before the accused had been convicted in the secular courts.

Such was the law of Spain in respect to prosecution for bigamy, and the sunken condition of the inquisition, when no ecclesiastic, however high may have been his dignity, would have ventured to make such a decree as was issued by the presbyter canon of the Cathedral church of New Orleans against Jerome Des Grange for bigamy. It had all the form and more than the vigor of the holy office. It was entitled "Criminal proceedings instituted against Geronimo Des Grange for bigamy by the vicar general and governor of the bishopric of this province, and attested by the notary, Franco Bermudez." The canon subsequently styles himself canonical presbyter of this holy Cathedral church, which he was; but adds that he was provisory vicar general and governor of the bishopric of the province, which he was not. This assumption was either ignorance, or was intended to give consideration to himself or to the prosecution. He was neither provisor nor vicar general. For the manner in which those functions were deputed by the bishop, we refer to the 3d volume of the *Instituciones de Derecho Canonico Americano*; \*Appendice Primero, pages 394, [ \* 588 ] 395, 396, 398. The decree purports to have been issued

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on the 4th of September, 1802. It begins by saying that it had been publicly stated in this city that Geronimo Des Grange, who had been married in 1794 to Maria Julia Carriere, was at that time married before the church to Barbara Jeanbelle, and is so now, who has just arrived; and also, that Des Grange, having just arrived from France a few months since, has caused another woman to come here, whose name will be obtained. It is also reported in all the city, publicly and notoriously, that Des Grange has three wives, and not being able to keep it a secret, &c., &c., his excellency has ordered, in order to proceed in the investigation and the infliction of the corresponding penalty, that testimony be produced to substantiate his being a single man, which Des Grange presented in order to consummate the marriage, and that all should appear who can give any information in the matter, &c., &c. And as it has been ascertained that Des Grange is about to leave the city with the last of his three wives, let him be placed in the public prison during these proceedings, with the aid of one of the alcaldes, this decree serving as an order, which his excellency has approved, and as such it is signed by me, notary. Before me,

FRANCO BERMUDEZ.

(Signed,) THOMAS HASSETT.

It is not necessary to cite any of the proceedings upon that paper, or to speak of the frequently-occurring notarial certificates of Francisco Bermudez. The whole of it, however, shows that what was done was so under his contrivance and auspices. The canon, Hassett, is made to begin as an ecclesiastic in authority, and signs the decree, but places the execution of it and the imprisonment of Des Grange upon an order of his excellency. It is twice referred to in the paper as a part of it. It should have been produced with the other proceedings. Without that being done, no part of it can be received in evidence as the record of an authentic judicial tribunal. The whole paper is a novelty in the proceeding of an ecclesiastical court. His excellency means the chief alcalde of the city, who had no legal authority under the law of Spain to sanction [ \* 589 ] such \*a prosecution, or to order the execution of it, either by the introduction of testimony or the imprisonment of the accused. The paper signed by Franco Cassiergues is insufficient for that purpose.

The procedure of the holy office in such cases will be found in the article Inquisition, in the 8th edition of the Encyclopædia Britannica, volume 12, page 389. It establishes the fact that the canon, Hassett, and Bermudez, intended to proceed against Des Grange according to the forms of the holy office, and that at a time

when its functions in such particulars had ceased in Spain and in the Indies. Those who are curious may also find directions for such a procedure in Burns's Ecclesiastical Law, and in Oughton's Ordo Judiciorum sive Methodus Procedendo in Negotiis et Litibus in foro Ecclesiastico Civili Britannico et Hibernico, 2d volume, Mr. Bentham, also, in his Rationale of Judicial Evidence, specially applied to English practice, volume 2, book 3, chapter 17, pages 380 to 403, exposes with cogent reasoning and admirable satire the artifices of the early English ecclesiastics, and their success in getting up a similar initiation of a prosecution in contravention of English statutes.

Before leaving the paper we have been examining, it is proper for us to allude to the testimony of Judge Foulhouse given in this case, and to his opinion given afterwards in confirmation of its invalidity.

When he was examined as a witness, it was distinctly understood between the parties, and agreed to, that the defendants might make a motion to suppress his testimony. That was not done. We cannot infer from it that the counsel of the defendants acquiesced in the witness's conclusion that the paper from the Cathedral church was inadmissible as evidence, but it is certainly good cause for the reliance placed by counsel in their argument of the cause upon the learned judge's declarations, and his support of them by his researches. He cites from the Partida, 7 tit. law 16; Novissima Recopilacion, book 12, tit. 28, law 16; Novissima R. book 12, tit. 28, law 10; the last being the cedula of Charles 3 in a case of imputed bigamy, ordering the inquisitor general to direct the inquisitors to take cognizance of the crimes of heresy and apostacy, \*bigamy being considered by the canon law as [\* 590] a kind of heresy, without assuming to do so "*by defaming the accused with imprisonment* before they had been previously and publicly convicted."

For the reasons given, supported by the royal ordinances of Spain, we have been brought to the conclusion that the paper from the Cathedral church of New Orleans, introduced by the defendants as a part of their evidence in this case, is inadmissible as such, and that all which it contains must be disregarded by us in the judgment we shall give.

We finally remark, that our extended examination of that paper has not been made because of its essential bearing upon the merits of the case of the complainant. It was to disabuse the record of what did not legally belong to it, and to correct misapprehensions which might arise unless its character and import had been

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legally shown. Give to it, however, the fullest credence, and it will be seen that it can have no effect upon the law of adulterine bastardy, upon which this case must be decided, which we are now to consider.

This brings us to the chief objection which was made in the argument, and most relied upon to defeat the recovery of the complainant. It is that her status of adulterine illegitimacy incapacitates her from taking as legatee under the olographic will of her father, though admitted to probate, as it has been, by the supreme court of Louisiana.

It is an averment of the defendant in his answer to the complainant's bill, but not in response to any allegation in it. It changes the attitude of the litigants from what it was in the case of *Gaines v. Relf and Chew*, in 12 Howard. Then Mrs. Gaines had the burden of proof to establish affirmatively the fact, that she was the forced heir of her father, and the donee of her mother, his widow. This court at that time did not think that had been satisfactorily done, and dismissed her suit, without affirming for or against the factum of marriage between her father and mother. Indeed, such a point could not have been made, or be supposed to have been intended to be decided by the court in the case then in

hand, without expressly overruling its decision in 6th [ \* 591 ] Howard, that there had \*been a lawful marriage between Daniel Clarke and Zulime Carriere, her father and mother, and that Mrs. Gaines was their lawful child. To get rid of the force and effect of that decision, the defendants, having only charged before that she was the offspring of an illicit intercourse between her father and mother, invoked the church papers of which we have spoken so much, in the hope of establishing from it that she was an adulterous bastard. And again, with the aid of that which is not evidence in the case, *and with much that is so*, they now rely to establish that charge. Mrs. Gaines meets the charge with new evidence, relying upon the old also, and with the declaration of her father in his last will, that "I do hereby acknowledge that my beloved Myra, who is now living in the family of Samuel B. Davis, is my legitimate and only daughter, and that I leave and bequeath unto her, the said Myra, all the estate, whether real or personal, of which I may die possessed, subject only to the payment of certain legacies, hereinafter named." And with this presentation of herself, of which she had never had the proof before, asked that the case might be judged according to the evidence, *and the laws applicable to it*. What that proof is will be arrayed hereafter in its proper place. Now, we only remark



that the burden of proof is upon the defendant, and that the law applicable to such a declaration in a will, concerning a child, requires that there shall be full proof of the contrary of it, and will not be satisfied with *semi plena probatio*.

But the law regulating the sufficiency of proof for the disaffirmance of such a declaration in a will cannot be fully understood and appreciated, unless our recollection shall be revived of the differences made by the ecclesiastical law and that of Louisiana as to the kinds of illegitimacy, and the disabilities and privileges attending them. In fact and in law they differ. The rights and capacities of illegitimates depend upon the distinctions being preserved.

If one be a bastard, from having been born, as the code expresses it in article 27, of an illicit connection, though they cannot claim the rights of legitimate children, yet, if they have been duly acknowledged by their fathers and mothers, *leaving \* no* [\* 592] *lawful children or descendants*, they, as natural children, will be called to the legal estate or succession of *the mother*, to the exclusion of her father and mother, and other ascendants and collaterals of lawful kindred. And in the case of their father's succession or estate, they may be called to the inheritance of it when he has acknowledged them, and has left no descendants, no ascendant, no collateral relations nor surviving wife, and to the exclusion only of the State. But though natural children, and known to be so, they can take by testament or will from their father, if born before their father's will were made. And here we have the reason, in the differences of their right of succession to their fathers and mothers, why Clark made his olographic will in favor of his legitimate daughter Myra; fearing from the clandestinity of his marriage, and other circumstances attending it, that her legitimacy would be denied, notwithstanding his habitual and daily acknowledgment of it, unless it was proclaimed and avowed in his will. They take or inherit by wills of their fathers, if born before the wills were made. As of a devise that B shall stand seized of land to the use of Jane, his daughter. This would be a good devise to her, if she were reputed to be so, though she were a bastard, and not so called in the will. Dyer, 323, pl. 29; S. C. Jenk, p. 239; 41 E. 3-13. But this does not extend to a bastard born after will made. Sid. 149; 39 E. 8-24; 3 Leon, 48, Rivers' case, 1 Atk. 410; Hardin v. Stardin, 2 Ves. Jun. 589; Blood v. Edwards, Cro. Eliz. 509, 510; Coke Litt. 123, B; *Ex parte Wallop*, 4 Brown C. C. 90; Kinnel and Abbott, 4 Vesey, 502.

A bastard in *esse*, whether born or unborn, is competent to be a devisee or legatee of real or personal estate. The only question in

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such a case is, whether, when in *esse*, the bastard is sufficiently designated as the object of the bequest. *Gordon v. Gordon*, 1 Merivale, 141; *Bayley v. Snelham*, Sim. and Stu. 78; 2 *Powel on Devises*, by Jarman, p. 260; Co. Litt. 3-6, and note 1; *Dyer*, 313; *Noy*, 35; *Park*, 26; 3 *Leon*, 48-49. But we ought to mention in this connection whether a gift can be made to a bastard not procreated is *vexata questio*. The early authorities certainly [\* 593] lean to the negative. The \*reason assigned is, "that the law does not favor such a generation, nor except that such shall be." *Bloodwell and Edwards*, Cro. Eliz. 509; Co. Litt. 3-6.

So that we see by the foregoing authorities, had it been proved in this case, or in any of the cases which the complainant has brought for her rights in her father's estate, that she was the offspring of an illicit intercourse, which we affirm it never has been, she would now be in the condition, from her father's testamentary declaration of her legitimacy, to take as his universal legatee. And if the case was made to turn upon that now, the complainant would be entitled to a decree; but it does not.

It is said, as an adulterous bastard, produced by an unlawful connection between two persons, who at the time when the child was conceived were either of them or both connected by marriage with some other person, the complainant cannot take under the olographic will of her father, because the code forbids it. The articles 217, 222, do forbid the legitimation or acknowledgment by their fathers and mothers of adulterine children. The article, 914, does say that in no case can adulterine children inherit the estates of their fathers and mothers—that is, as acknowledged natural children may do, by the articles 912 and 913 of the code. And it is declared by the 1475 article of the code, "that natural fathers and mothers can in no case dispose of property in favor of their adulterine or incestuous children, unless to the mere amount of what is necessary to their sustenance, or to procure them an occupation or possession by which to support themselves." This is the prohibition upon which the defendants rely to defeat the complainant.

The application of it, however, to the case in hand, was not as fully considered by the learned counsel for the defendant as it might have been. We will make it, with a decided Louisiana case for everything that shall be said, and by authorities for every general proposition cited, akin to the subject-matter.

The article containing the prohibition necessarily intends that the relation of the parties shall be such as it mentions, before it can have an effect upon either of them.

[\* 594] \* Now, we say, first, that the legal relations of adulter-

ous bastardy do not arise in this case ; for, independently of the declaration of the will, that the complainant is the legitimate child of Daniel Clark, this court having decided in 6th Howard that the marriage of Clark to Zulime was valid by reason of the invalidity of her previous marriage with Jerome Des Grange, that of course makes the complainant legitimate. But if it be assumed, as it was in the argument, that by the decision in 12 Howard, the marriage of Clark to Zulime was invalid on account of the validity of her marriage with Des Grange, then still Myra is legitimate *by the law*, as the offspring of a *putative marriage*.

The cases from the Louisiana reports are conclusive. The articles in the old code, 119, 120, are to this effect, that if both parents, or either of them, contracted the second marriage *in good faith, the issue of it will be legitimate*. So it was ruled in the case of Clendenen v. Clendenen, (3 New Series, 438.) The language of that case is, "that the plaintiff resists the claim on the succession of his father by a woman he married in the lifetime of his wife, the plaintiff's mother, and of the children, if born of that woman. The defendants contend that notwithstanding the plaintiff's father had a lawful wife at the time of his second marriage, that as the woman he last married was in good faith at the time of the marriage, and ever since, at least till after the birth of the last child she had by him, her marriage has its civil effects ; and that she and her children, the present defendants, are entitled to all the advantages the law gives to a lawful wife and children. There seems to be no dispute on the question of law. The woman who was deceived by a man who represents himself single, and the children begot while the deception lasted, are *bona fide* wife and children, and as such are entitled to all the rights of a legitimate wife and issue." The plaintiff then urged, that four of the children were born after the good faith of the woman ceased, as she had been advised of the illegality of her marriage by a communication made to her that her husband had another wife living in Tennessee. The court, however, said the proof of this knowledge was insufficient to deprive herself \*and her children of their rights, though [ \* 595 ] one witness swore he communicated that fact to her.

The next case came up before the new court organized in Louisiana under the constitution of 1845. It is that of Patton v. The Cities of Philadelphia and New Orleans, 1 Ann. 100. The facts were, that in 1799 A. Morehouse married Abigail Townes in the State of New York, and had two children by her. He subsequently came to the Spanish colony of Louisiana, and gave out that he was a widower, and married Elenore Hook. In the act of marriage, he

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declared himself the widower of Abigail Townes. By the second wife he had children, and both wives survived him. It was said, "the decision of the late supreme court in the case of Clendening v. Clendening *et al.*, 3 M. N. S. 438, in relation to the good faith of the second wife, is a correct application of the Spanish law, which regulated the subject-matter at the time of the marriage of the plaintiff's ancestor. By the law, 1 title, 13, part 4, it is ordained, that if, after both parties know with certainty the existence of the impediment to the marriage, they beget children, these children will not be legitimate; yet if, during the existence of such impediment, and while *one or both of them* was ignorant of it, they should be accused before the judges of holy church, and before the impediment, as proved in the sentence pronounced, they should have children, those begotten during the existence of the doubt will all be legitimate. We agree with the plaintiff's counsel, that the second wife, and all the children conceived during her good faith, have all the rights which a lawful marriage gives." In this case, also, it was said that the second wife was informed of the existence of her husband's first wife; "but the court answered, the evidence establishes nothing more than the existence of a doubt."

We now give the case of Olive Abston *et al. v. Rebecca Abston et al.*, decided in 1860, by the supreme court of Louisiana. Its ruling is coincident with the two previous cases cited, upon a statement of facts concurring with them, but more particular in detail.

Olive Abston sued to have herself recognized as the law-  
[ \*596 ] ful \*surviving wife of John Abston, deceased, late of the parish of Carroll, claiming she was entitled to a portion of the property of his succession. Her son, John N. Abston, the issue of her marriage with John Abston, deceased, joined in the action, for the purpose of having himself recognized as the legitimate son and lawful heir to the estate of his deceased father. John N. Abston is the exact case of Mrs. Gaines. The suit is against Rebecca Wright, the third wife of John Abston, deceased, and *the administrator of his succession or estate*. He intervened in his capacity of tutor of Nancy Nix Abston, the minor child of the defendant, the issue of her marriage with the deceased, claiming in behalf of the minor the rights of legitimate and forced heir in the succession of John Abston, her father. Rebecca Wright pleads in general denial, and avers that she was lawfully married to John Abston, deceased, in Warren county, in the State of Mississippi, and that if the plaintiff's alleged prior marriage was ever consecrated, it was unknown to her, and to all other persons residing in the State of Mississippi. She filed, also, a supplemental answer, averring that her husband, John

Abston, had made in the State of Mississippi his will, leaving to her his whole estate, after the payment of his debts, and that the will had been admitted to probate in the parish of Carroll, in Louisiana.

The facts of the case were these: John Abston married with Olive Hart, his first wife, and plaintiff in this suit, in the State of Alabama. John N. Abston, the co-plaintiff in the suit, and other children, were the issue of that marriage. John Abston abandoned his family in the State of Alabama without having been divorced, *a vinculo matrimonii*, from his first wife, contracted a second marriage with one Susan Bell, and she died. After her death, and being still undivorced from his first wife, he intermarried in Mississippi with Rebecca Wright. In a short time after this last marriage he removed from Mississippi into Carroll county, in the State of Louisiana, where he acquired a new domicile, and where he died, in which was situated the whole property of his succession, movable and immovable, at the time of his death.

This narrative, and the relations as they have been given \* of the parties to the suit, raised two questions, which it [\* 597] became necessary for the court to decide before it gave its opinion upon the question of the legitimacy of the two sets of children of John Abston, the bigamist, and father of them, and the rights of his two wives in his estate: First, as to the effect of the probate of the will, it being contended, as that had been done by a court of competent jurisdiction, that it could not be questioned collaterally, nor its validity be inquired into in the suit. The court declared that the decree of a probate court ordering a will to be executed does not amount to a judgment binding on those who are not concerned in it, and that when the will is offered as the title in virtue of which property is claimed or withheld, its validity may be inquired into. *Sophie v. Duplessies*, 2 Annual, 724; *Succession of Dupuy*, 4 Annual, 570. The other question raised was, whether the rights of the parties in the suit should be determined by the law of Mississippi, where the marriage of the defendant and the deceased had been contracted, or by the law of Louisiana, where John Abston had his domicile at the time of his death, where his succession was opened, and where all his property was situated. The answer to that question was, that the laws of Louisiana which regulate the right of succession make no distinction between persons who have contracted marriage in or out of the State, nor the issue of such marriages, whether born in or out of the State. If they have the qualities required by the law in matters of inheritance, they will be recognized as legal heirs without regard to the places of marriage or birth.

The court, then, with a proper regard to the fact that the will which had been made by John Abston *was invalid on account of its not having been attested by three witnesses, and that the succession was an intestacy*, determines that it could not be regulated by the law of Mississippi, as the plaintiff contended it should be, the basis of which is the common law, but that it must be by the law of Louisiana. We prefer to cite its own language as to the similitude and the differences between them: The prior marriage of the deceased with the plaintiff, which remained undissolved, [ \* 598 ] was a legal disability under the \* common law, which made the marriage with defendant, Rebecca Wright, not merely voidable, but void *ab initio*, and made their issue illegitimate, and incapable of succeeding by inheritance to the estate of any one. By the law of this State the disability of a prior marriage undissolved also renders the second marriage null and void; *but the legal consequences of a marriage void ab initio under our law are very different from those under the common law.* The civil code declares, that "the marriage which has been null nevertheless has its civil effects in respect to the parties and their children, *if it has been contracted in good faith. If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage.*" "In two cases, somewhat similar to the present, it has been held that each wife was entitled at the death of the husband to one-half, as the community property, after the payment of debts; and this rule will govern our decision in this case." *Patton v. Philadelphia*, 1 Annual, 98; *Hubbett v. Inksleon*, 7 Annual, 25. The mandate of the court was accordingly given, with this further decree, that John N. Abston, the co-plaintiff, and that *Nancy Nix Abston, the minor, represented by the intervenor*, are entitled as heirs-at-law to the separate property or estate of their deceased father, John Abston, and the costs of the appeal were directed to be paid, one-half by the plaintiff, Oliver Abston, and the other half by Rebecca Wright, the defendant.

But in further confirmation of what has been the Spanish law, and, of course, that of Louisiana, in legitimating the children of those who marry in good faith, believing upon good ground that there was not a precedent marriage to prevent it, we cite from the *Novissima Recopilacion*, 5 vol. 425, N. Ley. 10, what was said in the council allowed to be held by Charles 3, king of Spain, in the year 1777, for the purpose of giving to the inquisitor general a better understanding than he professed to have concerning the king's royal ordinance of 1770, concerning the jurisdiction of the holy office in bigamy and polygamous cases generally.

The result of that council, and so recognized by the king, was: "That by the act of marrying a second time, whilst the \*first wife was alive, the person who does so violates the [ \* 599 ] faith due to the marriage contract; that he deceives the second wife and wrongs the first; inverts the order of succession and of the legitimacy established by the laws, inasmuch as his fraud makes the children of the second marriage, *though truly adulterine, legitimate, and capable to inherit from their parents on account of the good faith of their mother in contracting that marriage.*"

To the same effect is the Code Napoleon. C. Cer. arts. 201, 202. The law of France was so before the code. Pothier, *Contrat du Mariage*, vol. 3, pp. 172, 107; Toullier, tome 1, 598; Marcadi *Explication du Code*, tome 1, 520; Law of Spain, *Partida*, 4 Lex, tit. 13, v. 1; Dalton's Dic. tome 2, 372; Tit. *Mariage*, 372.

Thus we see, though a child may be adulterine in fact, it may be legitimate for all the purposes of inheriting from its parents, if one or either of them intermarried in good faith.

Such is the law for others in Louisiana, and it must be administered accordingly for the complainant, if she stands in the position, by the evidence which the law requires and has determined to be sufficient to establish a marriage *in good faith* between her father and mother, *or as to either of them*, to entitle her to inherit from either or both of them *as legitimate by the law*.

On such a question good faith is first to be presumed. Marcadi *Explication*, tom. 1, pp. 522, 698. As to what constitutes good faith, it is adjudged that to marry a second time, supposing the previous marriage invalid, is one of the cases of good faith. Dalton's Dic. tom. 2, p. 371; Tit. Spain, No. 578. The two last citations have been given to show the inaccuracy of the conclusion of the learned counsel of defendant, that if the invalidity of the marriage between Des Grange and the complainant's mother was not proved, she was necessarily an adulterine illegitima.

She was heir-at-law if procreated by Clark in good faith, or if conceived by her mother in good faith—that is, she supposing her capacity to become the wife of the former.

Nor was a sentence of the nullity of the marriage between Des Grange and the complainant's mother necessary to \*protect the legitimacy of the offspring. Marcadi *Explication*, tome 1, p. 495; Ibid, p. 519; 2 Phillimore's Reports, 19; Shelford on Marriage, Law Library, vol. 31, p. 275.

The good faith of Clark and Zulime is proved by the evidence of Madame Despau (Old Rec. 580) and Madame Calliant, (Old Rec. 309,) and by the contemporaneous facts relating to the marriage,

as well as by the testimony of Caviliere (Old Rec. 546) as to the bigamy of Des Grange, by the testimony of Bellechasse, by that of Madame Benguerel. Old Rec. p. 349. The good faith of Clark in marrying is proved by his own declarations in the last years of his life. By Bellechasse's testimony, Probate Record, 173, Boisfontaine, Ibid. 162, Mrs. Smyth's, Ibid. 152. Again: the good faith of the marriage is proved by the authentic declaration of Clark in his will that the complainant was his legitimate daughter and only child. See, also, the opinion of the supreme court of Louisiana, Charles Succession, 11 Annual Reports.

But we now say, if we are to consider the question of adulterine bastardy to be properly before us in this case, it cannot affect the rights of the complainant under the will of Clark of 1813. If the complainant, by reason of the matrimonial character of her mother, shall be deemed adulterine on that side, she is not so on the side of her father, he having been as a single man free to marry; and if he did marry in good faith, she is not incapacitated, as respects him, to be, under his will, his universal legatee. *Journal du Palais*, vol. 60, p. 45, January 7, 1852.

There is no pretense that Clark was incapable to contract marriage; and it matters not whether, as to the mother of the complainant, any impediment existed under the Spanish law; the complainant stands as the declared issue of her father by a woman to whom he supposed himself lawfully married. Not only the bill itself, but the evidence upon which it is established, shows that Daniel Clark had no other legitimate issue. No one exists who has any right to contest his acknowledgment of the legitimacy of his child, or to set up the adulterous source of her origin. See C.

N. art. 335, 2 Marcadi, pp. 51, 31, 52, Nos. 60, 61, 62; [\* 601] *Journal du Palais*, vol. 60, p. 45; \*Jobert *et al.* v. Pitot

Ex'ors, 4 Annual, 305; Judge Foulhouse's Opin. 57, 58; 2 Toulliers, 960.

The testamentary recognition of a child as legitimate is of the highest legal authority. All presumptions are to be taken in favor of such a declaration. Matthews on Pres. Ev. pp. 284, 286; Gaines v. Chew, 12 Howard, 593; Miller v. Andrews, 2 Louisiana Annual, 767; Jarman on Wills, vol. 1, p. 188; 5th Phillip's Note, 284, 287, and authorities cited; 1 Greenl. Ev. 134. And we now cite, in confirmation of all that has been said upon this point, the 117 Nouvelle of Justinian. It gives the rule of evidence in such cases, and it prevails in every ecclesiastical court in Europe, where the Roman law is the basis of its jurisprudence, in respect to the legitimacy of persons. It is also, in cases of that kind, the law of Louisiana.



We give it in the original Latin: "*Ad hoc autem et illud sancire perspeximus, ut si quis filium aut filiam habens de libera muliere cum qua nuptiæ consistere possunt, dicat instrumento, sive publica, sive manu conscripto et habente subscriptionem trium testium fide dignorum, sive in testamento, sive in gestis monumentorum, hunc aut hanc filium suum esse, et non adjecerit naturalem, hujusmodi filios, esse legitimos, et nullam aliam probationem ab iis quæri, sed omni frui eos ure quod legitimis filii nostræ conferunt leges.*" Translation: "We have determined to ordain, that if any one having a son or daughter of a free woman, with whom he might have been married, shall say in a written act, either before a public officer or under his own hand, sustained by three credible witnesses, or in his last will, or in public acts, that this son or this daughter is his child, and that he does not call them natural children, they shall be *reputed legitimate*, and no other proof shall be demanded of them, and they shall enjoy the rights of legitimate children." This Nouvelle has been the subject of much criticism and learned interpretation by the most distinguished civilians. By no one more so than the Chancellor d'Auguesseau, in his declaration or ordinance of 1736, which had for its object, as he himself says, to explain and affirm the proofs of the legal condition of men. The declaration consists of forty-two articles. Several of them relate to the form in which baptismal acts ought to be registered to give verity to [\* 602] legitimates; but whether they are so or not, this ordinance of Justinian secures to children legitimacy, if they shall be placed by their fathers or mothers within its predicament. And we may add, that the interpretation of it by all who have been skilled in the civil law is, that it attaches legitimacy to the son or daughter of a man and woman who are both free, but that it does not demand that the word legitimate should be applied to them to make them so. On the contrary, the Nouvelle means that if the child is not called a natural child, he is of right to be reputed legitimate, and the commentator's remark is: "Mark well, that this is not a Roman law made when paganism reigned in Rome, but a law made by a christian emperor." Merlin Repertoire de Jurisprudence, 17 vol.; Tit. Legitime, secs. 1 and 11, pp. 348, 349; Ed. Bruxelles, 1827; Question d'Etat; On la previe testimoniale ne ful point admise, tome 8; Causes Celebres Filiation Reclamée, Sans acte de baptême, sans une Veritable Possession d'Etat, sur le fondement, de plusieurs forte consecutions; tome 19, Causes Celebres, 204.

Such as we have stated it to be is the law relating to the children of a *putative* marriage, though it be adulterine in fact, if it was

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contracted in good faith by the parties, or by either of them. Their children are legitimated to inherit from their parents, either in a case of intestacy or to take by testament. In the latter, a declaration by either father or mother that they are their children, without the addition that they are natural children, will make them legitimate, and no other proof can be demanded of them to enable them to enjoy all the rights of legitimate children. But the case in hand is even stronger than that, for here the father in his will "acknowledges his beloved Myra to be his legitimate and only daughter," and makes her the universal legatee of his estate after the payment of certain legacies.

But the defendants aver that the connection between her father and mother was adulterine, even though they may have been married, and on that account that she is barred from taking as legatee under her father's will.

We will now give the proofs upon which they rely to [ \* 603 ] substantiate \* their allegation, in connection with the voluntary rebutting testimony of the complainant, as we find it in the record.

The paper from the Cathedral church in New Orleans is first invoked by the defendants. Now, though that paper has been shown to be an unauthorized attempt by a canonical prebendary, without jurisdiction of any kind in such a matter, upon a public report, to try Des Grange for bigamy, for having three wives at the same time, and to make him answer by imprisonment, whether such an irresponsible accusation was true or not true, the defendants in our consideration of their averment shall have the full benefit of that paper as evidence, though we have declared it to be inadmissible as such.

Des Grange, it appears from the paper, was put in the public prison and kept there until the canon, Hassett, after having examined several witnesses, decreed: That not being able to prove the public report, he directed the proceeding to be suspended, to be resumed thereafter if it should become necessary, and that Des Grange should be set at large, on condition that he paid the costs. This he did, and fled from New Orleans, without ever having again any conjugal relations with the mother of the complainant, though as it will directly appear from the paper that he was indebted to her for his enlargement from the canon's usurped authority. Nor did Des Grange reappear in New Orleans until after the cession of Louisiana to the United States.

In the course of the proceedings against Des Grange, both himself and the complainant's mother were examined as witnesses.

Both of them reply to questions concerning his bigamy in respect to his marriage in 1794 with her ; acknowledged that they were aware of the report prevailing against him in that regard ; and she says that about a year since (in 1801) it was stated in the city that her husband had been married at the north, and wishing to ascertain whether it was true or not, that she had gone to Philadelphia and New York, where she used every exertion to find out the truth of the report, and that she learned only that he had courted a woman, whose father not consenting to the match it did not take place, and \*she married another man shortly after- [ \* 604 ] wards ; and she adds, that she had recently heard that her husband was married to three women, but she did not believe it, nor had she any doubt about the matter which rendered her unquiet or unhappy. All of this Des Grange confirms ; for being asked why his wife, Maria Julia Carriere, went to the north last year, he answers : “ That the principal reason was, that a report had been circulated in this city that he was married to another woman ; she wished to ascertain whether it was true, and she went.”

Thus the defendants, by the introduction of the paper from the cathedral, show the existence and currency of the report of Des Grange's guilt of bigamy in marrying the mother of the complainant, and the aggravation of it in the public mind by the prosecution of him, and from the canon not having dismissed it altogether, but having retained it for further inquiry. Upon his enlargement, as has been proved by unimpeachable testimony, Des Grange fled.

Now, in this connection, it is appropriate to state the evidence which the law will receive and pronounce to be sufficient to determine that he did commit bigamy when he married the mother of the complainant. It so happens, excluding all admissions of it to the family of the mother of the complainant, the fact is proved by a witness, the truthfulness of whose testimony has not been assailed, and could not have been.

Madame Benguerel has no connection with the family of the complainant, and her standing and character were such that the defendants could not impeach her credit by even an insinuation against either ; but she was subjected to their cross-interrogation. It brought out neither difference nor contradiction of herself, nor was there anything in the way in which she gave her testimony to subject her to any suspicion of friendship to the complainant, or of any want of memory or uncertainty in her narrative.

Madame Benguerel says : “ My husband and myself were very intimate with Des Grange, and when we reproached him for his baseness in imposing himself upon Zulime, he endeavored to excuse

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himself by saying, that at the time he married her he had [ \* 605 ] abandoned his lawful wife, and never intended to \*see her again." In answer to a cross-interrogatory put upon the point, she says: "I am not related to the defendants, nor with either of them, nor am I with the mother of Myra; nor am I at all interested in this suit." She adds: "It will be seen by my answers how I know the facts; I was well acquainted with Des Grange, and I know the lawful wife of Des Grange, who he married before imposing himself in marriage upon Zulime."

The paper then discloses the following facts: That Des Grange was notoriously charged with bigamy in marrying Zulime; that she left New Orleans "for the North" in 1801 to get proof of it; that he says that her principal reason for going was for that purpose; that he was prosecuted for bigamy by the canon in 1802, and was temporarily released from prison after Zulime had sworn that she did not believe the report about him. It is in proof, also, that he then fled from New Orleans, and did not return to it until the year 1805. Her interference or testimony before the canon negatives every suspicion that she had any agency in instigating the prosecution against him. His own oath upon the occasion confirms it, for he speaks of his wife being satisfied with his innocence, and there is not a word in the paper nor in any of the evidence to show that her friends had provoked or abetted in any way the public accusation of his bigamy. Nor is Clark, the father of the complainant, at all associated with that procedure. Indeed, he was in Europe at that time. With all these facts and obvious inferences from them, taken in connection with the testimony of Madame Benguerel, the only question concerning the bigamy of Des Grange in marrying the mother of the complainant when he did, is whether the law determines the evidence to be sufficient in a civil suit to establish the fact.

We think that the law requires us to pronounce that it is sufficient.

A charge of bigamy in a criminal prosecution cannot be proved by any reputation of marriage. There must be proof of actual marriage before the accused can be convicted. But in a civil [ \* 606 ] suit the confession of a bigamist will be sufficient, \*when made under circumstances from which no objection to it as a confession can be implied. There are none such in this case. The first legal consequence of such a state of the evidence is, that it released the mother of the complainant from all conjugal obligations with Des Grange, making her free to contract marriage with any other man who was free to intermarry with her. But that conclusion is not the purpose for which we have used, as the defend-

ant wishes it, what the church paper discloses. The object has been to show that the defendants have introduced that paper in support of the charge of adulterine bastardy, when in fact it discloses a condition of things from which it may well be inferred that both the father and mother of Mrs. Gaines intermarried in good faith. It is far short of the evidence in the record to prove that they did so, which will be seen presently. Then the next testimony which the defendants rely upon to aid in proving the adulterine status of the complainant is that of Daniel W. Coxe, the friend and co-partner in business with Daniel Clark. His testimony was originally taken in a previous case to invalidate the marriage between Clark and the mother of the complainant. In 12 Howard, as it was in this case, it was associated with the church paper to sustain the objection we are now considering. In the argument, it was said that the two were sufficient to prove it. But take the testimony of Mr. Coxe as a whole, or in its particulars, and no part of it has the slightest bearing upon the canon's prosecution of Des Grange, or upon the objection that the complainant was the offspring of an adulterous intercourse. Mr. Coxe begins with the history of Caroline Barnes, giving an account of the preparations which he had made at the solicitation of Daniel Clark for the confinement of her mother, and then states it to be his belief that Clark had never married her. Beyond this, in regard to the marriage, he does not speak, except in his offers to the success of his effort to dissuade her from attempting to prove it, and that he did not believe that Daniel Clark was in Philadelphia in the year 1803, when it is alleged that he married there the mother of the complainant. Many other circumstances are narrated by Mr. Coxe in connection with the affairs of Mr. \* Clark, and of his acknowledgment of Caroline Barnes [ \* 607 ] as his illegitimate child. But after the closest examination of them in connection with the point of adulterous bastardy, and that Clark and Zulime, after the birth of Caroline, were married in good faith, there is not a word in Coxe's testimony to impeach the fact of marriage, or the fidelity of the parties in entering into it.

The defendant also gave in evidence a letter written by Bellechasse, from Matanzas, to Coxe, in reply to one from the latter. Coxe had written to Bellechasse at the instigation of Mr. Relf, requiring him to dispose of fifty-one lots in favor of Caroline Barnes, to the exclusion of the complainant, for whom they were confided by Clark to him for her benefit. This Bellechasse refused to do. He then states what had previously passed between Relf and himself concerning these lots. He had before given to Relf his renun-

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ciation of any ownership of them, with directions to dispose of them for Myra, stating what had passed between himself and Clark upon the subject, as he has related it in his testimony. Probate Record, pages 173 to 182, inclusive, answer to 13th interrogatory. This letter does not relate in any way to the marriage between Clark and the complainant's mother, or to their alleged adulterous intercourse. It, however, confirms the honorable character of Bellechasse, and strengthens all that he had said of Clark's declarations to him of the legitimacy of his daughter Myra, and of his intentions to make her the heiress of his estate. This letter seems to us to have been introduced into this case by the defendants, with some expectation that it might serve to make Bellechasse's testimony equivocal, and also to associate both Myra and Caroline as the adulterine offspring of Clark and Zulime. The attempt, in our view, is a failure as to both. The complainant's status depends upon the evidence in this case. That of Caroline Barnes, notwithstanding the declarations of Coxe that she is the natural child of Clark by Zulime, must be determined by the law as to what were the relations between her mother and Des Grange when she was conceived and born. The witness, Madame Despau, says that she was at the birth [ \* 608 ] of Caroline, and that it took place in 1801. Mr. \* Coxe says, to the best of his belief, that she was born in the year 1802, but without any of those attendant circumstances which give even a coloring to the correctness of his chronology as to the event of which he was speaking, and with one proceeding from himself, which shows how little reliance can be put upon the accuracy of his memory, either as to the time when he says Mrs. Des Grange presented to him Clark's letter to have her taken care of in her confinement, as she was with child by him, or as to the time of the birth of Caroline, or as to Clark's visits to Philadelphia immediately preceding his departure for Europe in the year 1802. In Mr. Coxe's second examination, he states it had been disclosed to him by his correspondence with Clark that the latter had been in Philadelphia from late in 1801 to the last of April, 1802, all of which time Zulime was there ; that it was in April that Clark returned to New Orleans, and afterwards that he had revisited Philadelphia in July, 1802, on his way to Europe ; thus confirming the statement of Madame Despau in those particulars. In the absence of all contrary proof, either by circumstance or deposition, the declaration of Madame Despau as to the time when Caroline Barnes was born must be received to establish that fact. And that being in the year 1801, however much it may be suspected that she was the child of Clark, and even that he supposed her to be so, she

must be considered in law to be the child of Des Grange, the gestation of her mother and the birth of the child being within the time before any interruption had taken place of their conjugal relations. That is proved by evidence introduced into the case by the defendants. The first is the power of attorney of the 26th of March, 1801, given by Mesdames Caillavet, Lasabe, and Despau, authorizing Des Grange, their brother-in-law, to proceed to Bordeaux, in France, to recover property of which they were co-heiresses of their father and mother. Next, by a general power of attorney, which Des Grange at the same time gave to Zulime to act for him in all his affairs during his absence. She did so in several particulars, styling herself the legitimate wife and general attorney of Don Geronimo Des Grange. Des Grange accepted the power given to him, sailed for France in \*April, and on the 1st July, 1801, wrote [ \* 609 ] from Bordeaux to Clark to aid his wife with his advice, should she be embarrassed in any respect, and expressed his uneasiness that he had not yet heard from her; saying, also, that he was then engaged in a "lawsuit for the purpose of recovering an estate belonging to my wife and family." Now, under such a chronology of circumstances and of conjugal amity, we need not say that as access between man and wife is always presumed until otherwise plainly proved, and that nothing is allowed to impugn the legitimacy of a child short of proof by facts showing it to be impossible that the husband could have been the father of it, the law then establishes the relation between Des Grange and Caroline as having been that of father and legitimate child, and that she was not the offspring of an adulterous commerce between Clark and Zulime; though Coxe says she was, and reaffirmed substantially in his letter to Bellechasse, as we gather from his answer in his refusal to turn over property to Caroline which was received by him from her father for Mrs. Gaines. See letter in page 896 of Record of Gaines v. Hennen.

The defendants also gave in evidence an authenticated record from the county court of New Orleans. It was introduced by them, and declared by them, in their answers to the complainant's bill, to be a petition by her mother, Zulime Nee Carriere, wife of the said Des Grange, to a competent judicial tribunal in New Orleans, praying for a divorce and dissolution of the bonds of matrimony existing between her and Des Grange, which was subsequently decreed after the birth of the complainant. But they now urge and declare that such record and decree prove nothing in the case. In our opinion it proves much, though differently from what it was introduced for. Their counsel now says, that the record is deficient in the petition, and therefore that it does not appear that its object

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was the annulment of the marriage between Zulime and Des Grange on account of his bigamy. The petition is wanting; and why, has not not been satisfactorily shown by the defendants. They knew

it to be wanting when they introduced the record of evidence, and on that account cannot now \*repudiate it for

what it contains, because that is against the purpose for which it was introduced. It shows that a petition was filed; that a curator was appointed for Des Grange; that he was summoned to answer for Des Grange; that he appeared and demurred to the jurisdiction of the court *in cases of divorce*, and on that account that the court could not pronounce a judgment therein, and that the damages prayed for in the petition could not be assessed until after the court had rendered judgment touching the validity of the marriage. There was a joinder in demurrer, which, however, was withdrawn, and the curator filed the general issue. The docket entries in the suit, kept by the clerk, are in conformity with the act of April 10th, 1805, section 11. They are as follows: Petition filed June 24, 1806. Debt or damages, \$100. Plea filed 1st July, 1806. Answer filed July 24, 1806. Set for trial 24th July. The witnesses are stated, and the costs given. And then follows judgment for plaintiff, damages \$100, July 24, 1806. Now, this extract of so many particulars makes out as well as it could be done the purpose of the petition, and establishes consistently, as it is required to be done, by the rules of evidence for such a case, that the marriage between Jerome Des Grange and Zulime, or, as otherwise named, Marie Julia Nee Carriere, was thereby declared null and void. But the defendant's counsel says, that the record is inoperative for any purpose, inasmuch as it was a proceeding at the instance of Zulime in her maiden name, three years after her alleged marriage with Clark. It is forgotten that a judicial invalidation of marriage at any time for the bigamy of a party to it relates back to the time of the marriage, and places the deceived in a free condition to marry again, or to do any other act as an unmarried woman, without any sentence of the nullity of the marriage. The evidence, too, shows that the procedure by Zulime against Des Grange originated in her anxiety to place herself in that condition in respect to her marriage with Clark, which he had enjoined upon her to keep secret until a sentence of the nullity of her marriage with Des Grange had been obtained. She could not, under such

circumstances, use Clark's name in such a suit; she could [\* 611] not \*have sued in Des Grange's when disclaiming the validity of her marriage with him; and therefore her counsel in filing her petition used her maiden name, as it was proper and



professional in them to do. One thing is certain, that the record from the county court of New Orleans does not in any way sustain the charge against this complainant of adulterine bastardy, but adds another circumstance to the many which exist in proof of the marriage between her father and mother, and of the good faith with which they entered into it.

To confirm what has just been said, we will now cite the evidences of it:

“Madame Despau testifies that she was at the marriage of Zulime and Clark in 1802 or 1803; that it took place in Philadelphia, and the ceremony was performed by a Catholic priest, in the presence of other witnesses as well as of herself. She states that she was present when her sister gave birth to Mrs. Gaines; that Clark claimed and acknowledged her to be his child, and that she was born in 1806. That the circumstances of her marriage with Daniel Clark were these: Several years after her marriage with Des Grange, she heard he had a living wife. Our family charged him with the crime of bigamy in marrying Zulime. He at first denied it, but afterward admitted it, and fled from the country. These circumstances became public, and Mr. Clark made proposals of marriage to my sister, with the knowledge of all our family.” The witness then continues her narrative, that it was considered essential before the marriage should take place that proof should be obtained from the Catholic church in New York of Des Grange’s bigamy, it being there that his prior marriage had taken place. They went there; found that the registry of marriages had been destroyed. Clark followed them, and having heard that a Mr. Gardette in Philadelphia had been one of the witnesses of the prior marriage of Des Grange, and he told them that he had been present at the prior marriage of Des Grange; that he knew him and his wife; that the wife had sailed for France. Clark then said, you have no reason any longer to refuse to marry me; it will be necessary, however, to keep our marriage secret until I have obtained judicial proof\* of the nullity of your marriage with Des Grange. [\* 612] They were then married.

Such judicial proof was subsequently obtained, as has already been shown. Another witness, Madame Caillavet, confirms the statement that Clark made proposals of marriage for Zulime to her family, after her withdrawal from Des Grange, on account of her having heard that he was the husband of another woman then alive. She also swears that Clark admitted the marriage to her, and that so did Zulime. Clark also made an acknowledgment of it to other witnesses, with simultaneous declarations to them of

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the legitimacy of Myra ; and his paternal treatment of her from her birth to his death impressed them with the full belief of the fact and of the sincerity of the purposes for which he made such declarations. Mrs. Harper, who nursed Myra, not as a hireling, but as the friend of Clark, says that he made to her at different times declarations of the child's legitimacy and of his marriage with her mother. He admitted it, also, to Boisfontaine, and added, that he would have avowed the marriage but for her subsequent marriage to Gardette. Pressed upon by such proofs, every effort was made by the most searching and repeated cross-examination to lessen the force of them without success. Failing in this, a direct attempt was made to discredit their veracity by an impeachment of their characters. It was a signal failure. Forty years of their lives were canvassed to bring upon them some reproach. The proofs to the contrary were decisive. They, too, had had their misfortunes ; but their lives had been passed in the different places where they had lived, not only without censure, but altogether free from suspicion. Their testimony was also put in comparison with that of Mr. Coxe. They do differ in immaterial circumstances, but in nothing concerning the marriage between Clark and Zulime. All that Coxe had been able to say about that was, that he did not believe it. That conclusion, too, he came to by inferences from his own narrative concerning the time of the birth of Caroline Barnes ; that he withdrew afterwards, as to the time of its occurrence, and also as to his declaration, that Clark had not been in Philadelphia in the year 1801, extending his sojourn there for more than [ \* 613 ] \* four months, whilst Zulime and her aunt were in search of proofs of the bigamy of Des Grange. The evidence also shows that Clark aided their inquiries for that purpose. Besides the want of memory of Mr. Coxe, his narrative shows so strong a bias against the marriage that we must receive it with many grains of allowance. After Zulime had obtained a sentence of the nullity of her marriage with Des Grange, she went to Philadelphia to learn the truth of reports which were in circulation concerning the fidelity of Clark to herself. She had an interview with Coxe ; told him her purpose, and her intention to proclaim her marriage with Clark, unless she became satisfied upon that subject. He told her that she could not prove her marriage, and afterwards advised her to take counsel of a lawyer. He, of course, dissuaded her from any attempt to do so. At the same time Coxe aggravated her distress and hopelessness by telling her that Clark was then engaged to marry a lady of distinction in Maryland, which, whether true in the particulars of his narrative of it, or as a general report, there is no proof in this

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record; but it served his purpose in disuniting Zulime and Clark forever. Clark was then in the height of his popularity and distinction in the congress of the United States. His friend sheltered him from the disclosure. Mrs. Harper, as a witness to Clark's admission to her repeatedly of the marriage, was cross-examined severely, but without any effect, to diminish the weight of her testimony in chief. Bellechasse and Boisfontaine, in their subsequent examinations, adhered to what they had at first sworn, and their characters forbade even a suspicion of its not being true.

Failing in every attempt to lessen the proof of the marriage, it was suggested that all of these witnesses were in combination to establish it by perjury. The defendant's counsel had himself extracted from their answers that they had no interest of any kind in the result of the suit. They are protected by the rules of evidence from any such imputation. There was no foundation for it.

The marriage, then, having been proved, the only point remaining is, whether it was contracted in good faith by the parties to it. We see no cause for thinking that it was not \*entered into in good faith. Supposing it, however, not [ \* 614 ] to have been so by Zulime, on account of her not having sincerely believed in the invalidity of her marriage with Des Grange, that could not take away the complainant's right to inherit her father's estate under his olographic will of 1813, if it has not been fully proved, as the rules of evidence in such cases require it to be done, that he did not marry in good faith. The doubts which may be indulged in respect to Zulime's sincerity cannot apply to him. He was an unmarried man, never had been married, when he united himself to Zulime, and the weight of testimony in the case is, that he did marry her in good faith. His conduct to his child from her birth to his death, his frequent declarations of his marriage to her mother, and of her legitimacy, and his avowal of it in his last will, are conclusive of his having married in good faith. The law applicable to such cases requires us to say so.

We have not thought it necessary to give all the evidence in this case in detail, but have accurately done so as to all of it bearing in any way upon the points in controversy, and especially as to that having any connection with the charge of adulterine bastardy. Those who may have any curiosity to read the testimony in full will find it in what is called the Probate Record; also in the cases as they are reported in 6 and 12 Howard, particularly in the old record of the last case.

Our judgment is, that by the law of Louisiana Mrs. Gaines is entitled to a legal filiation as the child of Daniel Clark and Marie Julia

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Carriere, begotten in lawful wedlock; that she was made by her father in his last will his universal legatee; and that the civil code Louisiana, and the decisions and judgments given upon the same by the supreme court of that State, entitle her to her father's succession, subject to the payment of legacies mentioned in the record. We shall direct a mandate to be issued accordingly, with a reversal of the decree of the court below, and directing such a decree to be made by that court in the premises as it ought to have done. Thus, after a litigation of thirty years, has this court adjudicated the principles applicable to her rights in her father's estate. They are now finally settled.

[ \* 615 ] \* When hereafter some distinguished American lawyer shall retire from his practice to write the history of his country's jurisprudence, this case will be registered by him as the most remarkable in the records of its courts.

*Decree of the court.*

This appeal having been heard by this court upon the transcript of the record from the circuit court of the United States for the eastern district of Louisiana, and upon the arguments of counsel, as well for the appellant as for the appellees, this court, upon consideration of the premises, doth now here adjudge, order, and decree, that the decree of the said circuit court be and the same is hereby reversed, with costs, and that such other decree in the premises be passed as is hereinafter ordered and decreed.

And this court, thereupon proceeding to pass such decree in this cause as the said circuit court ought to have passed, doth now here order, adjudge, and decree that it be adjudged and decreed, and is hereby adjudged and decreed upon the evidence in this cause, that Myra Clark Gaines, complainant in the same, is the only legitimate child of Daniel Clark in the said bill and proceedings mentioned, and as such was exclusively invested with the character of such legitimate child, and entitled to all the rights of the same; and that under and by virtue of the last will and testament of the said Daniel Clark, the said Myra Clark Gaines is the universal legatee of the said Daniel Clark, and as such entitled to all the estate, whether real or personal, of which he, the said Daniel Clark, died possessed, subject only to the payment of certain legacies therein named.

And this court doth further order, adjudge, and decree, that all property described and claimed by the defendant, Duncan N. Hennen, in his answer and exhibits thereto annexed, is part and parcel of the property composing the succession of the said Daniel Clark,

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to wit: the same which Richard Relf and Beverly Chew, under pretended authority of testamentary executors of the said Daniel Clark and of attorneys in fact of Mary Clark, by act of sale, dated December 28, 1820, conveyed to Azelic Lavigne; which the said Azelic Lavigne, by act \*of sale of the 29th of Feb- [\* 616 ] ruary, 1836, conveyed to J. Hiddleston, and which the said J. Hiddleston, by act of the 27th of May, 1836, conveyed to the New Orleans and Carrollton Railroad Company, and which the said company, by act of sale of the 13th of May, 1844, conveyed to the said Duncan N. Hennen, the defendant in this cause; that the said Richard Relf and Beverly Chew, at the time and times when, under the pretended authority aforesaid, they caused the property so described and claimed by the defendant, Hennen, to be set up and sold by public auction on the 19th day of December, 1820, and when they executed their act of sale aforesaid of the 28th of December, 1820, to the said Azelic Lavigne, had no legal right or authority whatever so to sell and dispose of the same, or in any manner to alienate the same; that the said sale at auction, and the said act of sale to Azelic Lavigne in confirmation thereof, were wholly unauthorized and illegal, and are utterly null and void; and that the defendant, Hennen, at the time when he purchased the property so described and claimed by him as aforesaid, was bound to take notice of the circumstances which rendered the actings and doings of the said Beverly Chew and Richard Relf in the premises illegal, null, and void; and that he, the said Hennen, ought to be deemed and held, and is hereby deemed and held, to have purchased the property in question, with full notice that the said sale at auction, under the pretended authority of the said Richard Relf and Beverly Chew, and their said act of sale to said Azelic Lavigne, were illegal, null, and void, and in fraud of the rights of the person or persons entitled to the succession of the said Daniel Clark.

And this court doth further order, adjudge, and decree, that all the property claimed and held by the defendant, Hennen, as aforesaid, now remains unclaimed and undisposed of as part and parcel of the succession of the said Daniel Clark, notwithstanding such sale at auction and act of sale in the pretended right or under the pretended authority of the said Richard Relf and Beverly Chew.

And the court doth further order, adjudge, and decree, that the complainant, Myra Clark Gaines, is the legitimate and \* only child of the said Daniel Clark, and universal lega- [\* 617 ] tee under his last will and testament, is justly and lawfully entitled to the property aforesaid so claimed and held by the defendant, Hennen, together with all the yearly rents and profits

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accruing from the same since the same came into the said defendant's possession, to wit, on the 13th of May, 1844, and for which the said defendant is hereby adjudged, ordered, and decreed to account to the said Myra Clark Gaines.

And the court doth now here remand this cause to the said circuit court for such further proceedings as may be proper and necessary to carry into effect the following directions; that is to say:

1. To cause the said defendant, Hennen, forthwith to surrender all the property so claimed and held by him as aforesaid into the hands of the said Myra Clark Gaines, as a part of the succession of the said Daniel Clark.

2. To cause an account to be taken by the proper officers of the court, and under the authority and direction of the court, of the yearly rents and profits accrued and accruing from the said property since the 13th of May, 1844, when it came into the possession of the defendant, Hennen, and to cause the same to be accounted and paid to the said Myra Clark Gaines; the account to be taken subject to the laws of Louisiana in cases of such recovery as is now decreed in favor of the said complainant.

3. To give such directions and make such orders from time to time as may be proper and necessary for carrying into effect the foregoing directions, and for enforcing the due observance of the same by all parties and by the officers of the court.

Dissenting: Mr. Chief Justice TANEY, Mr. Justice CATRON, and Mr. Justice GRIER.

Mr. Justice CATRON dissenting.

A principal question in this case is how far it is affected by the decree in the case of Gaines and Wife v. Chew, Relf, and others, reported in 12 Howard.

In that case the complainant sought to recover: first, [ \* 618 ] \* four-fifths of the real estate of Daniel Clark, alleged to be vested in the complainant, Mrs. Gaines, as heir of Daniel Clark; and, secondly, the undivided moiety of the real estate owned by Daniel Clark at his death, being the community interest taken by his widow, the mother of the complainant, Myra, from whom she obtained a conveyance for said moiety in 1844. In the former case this court found that Mrs. Gardette, the mother of Mrs. Gaines, was the wife of Jerome Des Grange, (in 1802 or 1803,) when the bill alleged she intermarried with Daniel Clark, and was, therefore, not the widow of Clark; and this moiety of the estate claimed by the bill was rejected.

2. It appeared in the former case, by the evidence furnished by the record in that suit, that Caroline Clark was the sister of Mrs. Gaines, born before the father and mother intermarried, as is alleged by the former bill; but she was fully recognized by the father as his illegitimate daughter, and was supported by him during his lifetime, and after his death by his friends. The deposition of Mr. Coxe proves these facts very fully.

Conceding the fact that the parents intermarried after Caroline's birth, then that marriage made Caroline a legitimate child of the marriage, and equal heir with Myra; such being the law of Louisiana. Nor could the father, by the laws of that State, take from his legitimate child more than one-fifth part of his estate by devise. Civil Code of 1808, ch. 3, sec. 1. And therefore Caroline and Myra each took as heir four-fifths of their father's estate, less the mother's moiety; that is, four shares each of twenty parts. On these portions the will of 1813 did not operate; the children holding the estate as heirs. It operated only on the two-twentieth parts which Daniel Clark had the power to devise by his will. Civil Code, 232, sec. 3; 234, sec. 4.

Caroline, who intermarried with Doctor Barnes, was a party respondent to the former suit, and answered the bill. She has since died beyond the jurisdiction of the court, and is not a party to this controversy; still, the interest of her absent heirs is entitled to protection. Nor can Mrs. Gaines set up any claim to that interest.

\* As respects the claim to one-tenth part, the next question is, whether the fact found in the former case, that the complainant was the daughter of Des Grange's wife, establishes the *status* of Mrs. Gaines, so that she is excluded from taking as devisee of Daniel Clark.

According to the provisions of the code of 1808, this court held that Mrs. Gaines could not take as heir of her father; nor could she take her mother's grant by the deed of 1844.

By the laws of Louisiana, as they stood in 1813, the complainant was an adulterous bastard, and could not inherit from her father, (Code of 1808, p. 156, art. 46,) which declares, that "bastard, adulterous, or incestuous children, even duly acknowledged, shall not enjoy the right of inheriting their natural father or mother." And article 15, page 212, declares, that "natural fathers or mothers can in no case dispose of property in favor of their adulterine children, even acknowledged, unless to the mere amount of what is necessary to their sustenance, or to procure them an occupation or profession by which to support themselves."

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The only issue decided in the former suit was, whether the complainant's mother for years before, and at the time of Myra's birth, was the lawful wife of Jerome Des Grange. The court so found, and based its decree dismissing the bill on that fact. *The fact* being established, carried with it all legal consequences that result from the fact. 1st Stark. Ev. 182, sec. 57. One of these consequences is, that Mrs. Gaines was an adulterous bastard, according to the laws of Louisiana, and incapable of taking by the will of her father.

But suppose this consequence does not follow; then how does the matter of estoppel stand? The complainant, Mrs. Gaines, by her amended bill, filed in 1848, renounced all claim that she had to the property sued for by her original bill, (including the same sued for now,) as instituted heir of Daniel Clark, by the will of 1813, and asserted a right to four-fifths of said property as legal or forced heir and only legitimate child of Daniel Clark, and declared she would *not* rely on said will of 1813. O. R. p. 85.

She also virtually renounced as heir one moiety of the [ \* 620 ] estate \* Daniel Clark died possessed of, and set up a deed from her moiety as lawful widow of said Clark; this being her community interest by the laws of Louisiana. Old R. p. 32.

That the widow was entitled to a moiety as her share in the community is alleged and relied on by the foregoing amendment; and the complainant being the party who made the avowal, is irrevocably bound by it. Such is the statute law of Louisiana, declared by the Code of 1808, (p. 314,) Code of 1815, (vol. 3, p. 355.)

In the former case the avowal was matter of title, and in this case it is conclusive evidence of the fact avowed as against the complainant. The law of Louisiana binds the federal courts in like manner that it is binding on the State courts. So this court has uniformly held. 1 St. at Large, 92; note (a) to 34th sec. of judiciary act of 1789.

If the mother was lawful widow of Clark, then her right to the moiety was undoubted, as the parties resided in Louisiana, and it is alleged the property was acquired during the coverture. Mrs. Gaines must abide by her allegations in the former suit, as on them the issues were formed, and on which the decree in that suit proceeded.

Nine of ten parts of Clark's estate was sued for by the former bill. The decree rejected on a direct issue five-ninths claimed to have been acquired by deed from said mother, on the ground that she was the wife of Des Grange, when, as is alleged, she intermarried with Clark, and when the complainant was born. This was the precise issue made, and found by the court, and is undoubt-



edly *res judicata* as respects the mother's moiety. As to the other five-tenths, Mrs. Gaines, by her amended bill of 1848, in express terms renounced one-fifth to the purchasers, under Daniel Clark's will of 1811. To the extent of one-fifth, the validity of that will was recognized. The complainant cannot be allowed to split up her claim and sue for portions by several suits.

The remaining four-fifths of the moiety Mrs. Gaines claimed to recover as legal or forced heir. Heir or no heir, was the issue tried. This court found that she was Clark's daughter \* by Des Grange's wife, and not Clark's lawful heir, and [ \* 621 ] therefore dismissed her bill. It follows, that as to the four-fifths of one-half, the complainant stands barred as heir by the decree. She is also estopped by the former proceedings to sue a second time for the moiety derived from her mother; and thirdly, is estopped to set up a claim to the one-tenth part she renounced and abandoned.

An objection is raised that the parties in this cause are not the same who were sued in the former case. The bill alleges that they are the same; and so they are, except that Mr. Hennen claims under the railroad company by a conveyance of the land in dispute, made pending the former suit, which, if it had been decided against the railroad company, would have bound Hennen, and being decided in favor of the company, bound the complainant.

The rule in chancery proceedings is, that where there are contesting parties in each suit, as between these parties, a decree is *res judicata*. It was so held by this court at the present term in the case of Thompson and als. v. Roberts and als. Sixty defendants were sued by the former bill; they all, as joint respondents, got a decree against the complainant on her common title set up against them all. The estoppel operated against her for each defendant; and in this second contestation of the same title any one respondent to the former suit can set up the estoppel in his favor.

The laws of Louisiana are confidently relied on as prescribing the true rule of estoppel. In this English bill in equity, resorted to here, as a remedy, the rule is, that the same subject-matter cannot be litigated twice between the same parties on evidence brought forward or left out of the first case. Here the will of 1813 is introduced, and could just as well have been introduced in the former suit. The difficulty was, that it had not been proved and recorded in the probate court. But it might have been proved just as well forty years before the time it was admitted of record as now. If a title deed could not be read on the hearing for want of being recorded, the complainant might fail to recover. This is of con-

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[ \* 622 ] stant occurrence; \*still, the judgment or decree would be as conclusive as if the deed had been authenticated and recorded. It was simply a neglect of the complainant to produce her proof in legal form; a matter with which the defendants had no concern. Holding back an existing will and making an experiment on the issue of heirship, requiring the same proof, and, in case of failure, to bring a second suit on the established will, is a mere contrivance, and an evasion of the due administration of justice, which cannot be allowed. On the will of 1813 the present bill is founded. By that *will* Daniel Clark declares the complainant, Myra, to be his only legitimate and lawful heir, and devises to her all his estate. She must, therefore, have been his daughter, born in wedlock. Conceding this to be true, and it follows as a consequence that the complainant took as heir, and not as devisee, to the extent of four-fifths. As to four-fifths of a moiety, we are by this bill called on to try the precise issue of heir, or no heir, that we tried in the former suit.

If the decision reported in 12 How. be overthrown, ruin must be the consequence to very many who have confided in its soundness. In a rapidly-growing city like New Orleans, much of the property supposed to be protected by our former decree must have changed hands. Large improvements must have been made in the nine years since that suit was decided. It covered all Daniel Clark's estate as it existed at his death, and had over sixty defendants to it. If the twenty odd defendants to this bill can be recovered against, so can the others who were parties to the first suit.

It is most manifest from this record that the fragment of a cause brought here by Mrs. Gaines and Mr. Hennen by stipulation will, in effect, decide, *and was intended to decide*, the course of the other defendants sued jointly with Mr. Hennen, and who are standing helpless, awaiting their fate at the hands of this court.

It is insisted by counsel that Clark, being a *free man*, could lawfully devise to his daughter; and that the laws of Louisiana did not apply to the case of a single and free man bequeathing [ \* 623 ] \*to his child by a married woman, as was done here.

Such a construction would evade the code to a great extent. Its terms are too plain for controversy, and so the courts of Louisiana have held. *Jung v. Dorescourt*, 4 L. 178.

According to this assumption, slaves might be devisees, if the evasion was used to suppress the fact that the mother was a slave. As in case of other conveyances, wills must have a grantee capable to take by the devise; and it is undoubtedly true that the heir-at-law, or a devisee, holding under a former will, can plead and prove

the facts of incapacity by parol evidence, and thereby defeat the last will, and of course alienances, in the condition these respondents are, can do the same. The case above cited (4 L. 178) is directly to this point, and to the same effect it was held in *Robinett v. Verdum*, (14 L. 542.) There, the court declared that a disguised donation to a slave child under the forms of a sale was absolutely null.

But the right and justice of this cause depends on the defense of the plea of *bona fide* purchaser set up by the answer. The bill in chancery is a remedy peculiar in its character, when resorted to in the federal court held in the State of Louisiana. In the State courts there, this defense is unknown. But when a complainant resorts to it to enforce rights to lands in the federal court, the respondent can defend himself, as an innocent purchaser, if he pleads, and can show that he acquired by purchase at a fair price, and got an apparent legal title, without notice of an outstanding better title, the purchaser believing that he acquired full property in the land; and the question is, has the respondent here made out such a defense? The purchase was made from Mary Clark, in 1820, by her legally-constituted attorneys in fact, Chew & Relf. She claimed to be the true owner by a will made in her favor as instituted heir. It is an olographic will, in due form, fully proved, and regularly recorded. This will, from the time it was probated in 1813, stood as the true succession of Daniel Clark for more than forty years. An immense estate in lands and personal property has been acquired under it, by all classes of innocent purchasers, without any suspicion of the fact that any other and better title existed. It is admitted on behalf of the respondents, \* by stipulation in this cause, that each purchaser who bought in 1820, and every subsequent purchaser under the first one, bought for a full price, paid the purchase money, and got a regular conveyance for the land purchased. This title, tested by itself, was a perfectly fair legal title, according to the laws of Louisiana. *Duplessé v. White*, 6 A. 514. If Mary Clark sold the estate without an authorization from the court of probate, by that act she rendered herself liable to pay the testator's debts; but this did not affect the purchaser. He was not bound to know that any debts existed, nor to see to the application of the purchase-money. The present bill does not allege that there were any debts owing by Daniel Clark at the time of his death; on the contrary, the complainant sues for the lands, and the rent and profits of them, without any reductions. Finding Daniel Clark's estate to be insolvent on the accounts exhibited, General and Mrs. Gaines, by their amendment of 1844,

declare that they do not require of said Chew & Relf any account, and that they "discontinue their prayer to that end."

The complainant admits the existence and probate of the will of 1811, but denies in general terms that the sales were lawfully made. For more than forty years the respondents and their alienors had a regular legal title, traceable to the only then existing succession of Daniel Clark; they could sue for and recover the land by force of that title. They knew nothing of the existence of Myra. She was born in New Orleans in 1804 or 1805, and immediately after her birth was taken from her mother by Daniel Clark, her reputed father, and put into the charge of Colonel and Mrs. Davis. In her childhood she was carried to the State of Pennsylvania, raised up and resided there till 1832, when she intermarried with William W. Whitney, under the name of Myra Davis; during all which time she was ignorant of her true name, history, and rights. She so states in her first bill, filed in 1836, put in evidence in this suit. Of course the purchasers of the lands sued for could have no knowledge of the complainant's existence when they paid their money and took title, in 1820.

But the respondents would have been *bona fide* purchasers \*had the will of 1811 never existed. Mary Clark [ \* 625 ] was the apparent legal heir of her son in the ascending line. Daniel Clark was known and recognized in New Orleans as an unmarried man; he had resided there from his youth, and was extensively and uncommonly well known, having represented the territory of Orleans in Congress. A number of witnesses prove, and most conclusively, that he was deemed and recognized universally as a man who had never been married up to the time of his death. His father was then dead, and Mary Clark, his mother, recognized as his undoubted heir. He addressed and made propositions of marriage to ladies of his own rank, after it is pretended he had married Madame Des Grange. Those who purchased in 1820, including judges of the highest rank residing on the spot, could not doubt the validity of Mary Clark's title, and power to sell the lands they bought and paid for.

In the printed argument submitted to us on behalf of the complainant, and again on the oral argument delivered before us in this court, the answer to this apparently complete defense was, that Mary Clark was dead in 1820, when her attorneys made the sales, and conveyed in her name.

The bill alleges no such fact, nor does the answer refer to it. But the complainant, by her bill of 1848, in evidence here, states that Mary Clark died in June or July, 1823, leaving a will, alleg-

ing who the legatees were, (of which the complainant was one;) and some of these legatees are made defendants to that bill. Daniel W. Coxe proves the circumstances connected with making the will of Mary Clark, and says she died in 1823, in which year her will was duly proved and recorded in Philadelphia county, Pennsylvania.

It is also relied on that Mary Clark did not accept the succession by taking possession of the estate in legal form. She made her power to sell, and did sell, and gave possession to the purchasers, and they have held actual adverse possession under their conveyances since 1820. This is admitted of record; and it is now too late, after the lapse of thirty-five years before they were sued, to set up this technical objection. The \*presump- [ \* 626 ] tion in favor of regularity in the proceeding is too clear to admit of controversy.

Another objection is made to the plea of *bona fide* purchaser, namely, that Chew & Relf had no authority from the probate court to sell, and that they joined with Mary Clark in the conveyance. The conveyance of Mary Clark was valid, notwithstanding this circumstance, as the supreme court of Louisiana held in *Duplesse v. White*, 6 A. 514. She held the actual legal title. The will operated as a conveyance in the same manner that a private act of sale would have done. It is proved that the sales of the estate were made at auction, and had the form of sales made by authorization of the court; this is the fair presumption; nor can the complainant at this late day have a decree against these respondents. Presumption that the executors were duly authorized to make sales for payment of debts comes instead of proof. This bill was filed more than thirty years after Mrs. Gaines became of age, and thirty-six years after the first vendor purchased and took title, in 1820; and it must be presumed that the proper orders of the probate court were granted. The presumption arises from possession and lapse of time. Possession of itself is, in the nature of men and things, an *indiceum* of ownership. If all persons acquiesce in the possession, the acquiescence tends to prove property in the possessor; and after the lapse of thirty years the probabilities so increase, that courts of justice, for the safety of society, hold an adverse claim to be without foundation. He who thirty years ago may have been abundantly able to show regularity of proceedings and evidence of ownership, may be unable to do so now. His witnesses may be dead, as is emphatically the case here. His title-papers may be destroyed or lost; and a court of equity must say, as the supreme court of New York did in the case of *McDonald v.*

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McNeal, (10 Johns. R. 380 :) "The fact is presumed for the purpose and from a principle of quieting men's possessions, and not because the court really think a grant has been made." Or, as the supreme court of Tennessee said in the case of *Hanes v. [ \* 627 ]* Peck, (Martin & Yerger's R. 236 :) "In such case, \*length of possession supplies the place of testimony; presumption is substituted for belief; we believe when the fact is proved; we presume in the absence of proof."

Had Mary Clark's devisees sued this purchaser, he could have relied on presumption to supply proof of regular orders from the probate court to authorize the executors to sell, or that Mary Clark regularly accepted the succession; and the same presumption must prevail against this complainant.

It is provided by the 7th section of the act of March 25, 1810, that contracts of sale of real property in Louisiana shall be recorded in the office of the parish judge where the property is situated; and if not so recorded, the contract shall be void. It is admitted in this case that both the power of attorney from Mary Clark and the deeds to purchasers made under that power were not recorded in the office of the probate judge, but that they were recorded in a notary's office in New Orleans; and it is assumed, and the cause is made to depend mainly on the fact, that the sales of Chew & Relf, as attorneys of Mary Clark, are null as to third persons for this reason. This is an entire mistake. The act of 1810, section 7, never had any application to the parish of Orleans, where the land in dispute lies. It "had reference to those parishes where the office of parish judge was established, combining with the judicial powers of the officer those of notary and recorder of mortgages," &c. "These powers were not possessed by the judge of the parish and city of New Orleans. The law is not applicable to this parish, and has been so considered ever since its enactment." *Morris v. Crocker*, 4 Louisiana, p. 149. It is further held, that the notarial offices of the city were the proper offices in which the record was to be made. *Id.* In this, and all other respects, Mary Clark's conveyance was regular.

The evidence shows, that as against the respondents to this bill, the claim set up is grossly unjust. Clark's failure was very large; his estate was wholly insolvent. The purchasers have in fact paid his debts to a large amount. Many of them are yet unpaid. The purchasers have built houses and raised families on the [ \* 628 ] property now sought to be recovered. A \*city has been built upon it. It has probably increased in value five hundred fold since 1820; much of it certainly has.

That the respondents have been harrassed with a previous lawsuit for the same property, in which the complainant claimed as heir, and was defeated, neither helps her case nor lessens the hardships imposed on the respondents.

At the argument, conclusions of law and of fact were relied on as having been established by the case of *Patterson v. Gaines* and wife, reported in 6 How. R. That was a false and fictitious case made up by Gaines and wife, with the assent of Patterson, they having relinquished to him the property sued for. The object of that suit was to circumvent this court by a fraudulent contrivance to obtain an opinion here, to the end of governing the rights of the other defendants sued jointly with Patterson. And in this, General and Mrs. Gaines seemingly succeeded. They obtained both the opinion and decree they sought; but when the other defendants came to a hearing they examined Patterson as a witness, and proved and exposed by his testimony the contrivance and fraud practised; and for us now to declare that so gross a contempt to this court, and the practice of a fraud so disgraceful to the administration of justice, established any matter of fact or any binding principle of law, would be to sanction and uphold that proceeding, and to invite its repetition. That case should be disregarded, as it was disregarded, when the cause of which it was part was fully and fairly heard in 1852, and which is reported in Howard's Reps. vol. 12.

The case of *Lord v. Veazie*, (8 How. 253,) is full to the point, that a fictitious proceeding is void because there is no contest. Patterson did not act in the matter at all, further than to lend his name to General and Mrs. Gaines. They made up the case by filing the answer to their own bill—filing such evidence as suited their purposes; and bringing up the appeal to this court in Patterson's name.

By an amendment to their bill made in 1849, (12 Howard, 537,) General and Mrs. Gaines had the boldness to allege and claim that the decree in Patterson's fictitious case was *res judicata*, \*and an estoppel to the other defendants to that [\* 629] suit; and to that end relied on the decree on the final hearing in 1852, thereby avowing the fraudulent object of obtaining that decree.

A question not directly decided in the case reported in 12 How. was whether Daniel Clark married Mrs. Des Grange. Madame Despau swore that she was present at the marriage in Philadelphia, and that several others were present. Her integrity and credit as a witness were so directly overthrown in the former case by the deposition of Daniel W. Coxe, and by many circumstances, as to

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leave her evidence of no value. She swore that she went to Philadelphia with her sister to procure evidence of Des Grange's marriage previous to marrying her sister. Coxe proved beyond doubt that the two women came there for the sole purpose of concealing the birth of a child, of which Mrs. Des Grange was pregnant, and of which she was very soon delivered, and it was secreted and raised to womanhood near Philadelphia. This was Caroline, afterwards Mrs. Barnes. And so soon as Mrs. Des Grange was able to travel, the two women returned to New Orleans. Me. Despau also swore in several depositions that this was Des Grange's child. At the time of its birth he had been absent in France for more than a year. Clark sent Mrs. Des Grange to Mr. Coxe with a letter, saying the child was Clark's, and to provide for the mother, and take charge of the child, which Coxe did. It was suggested at the argument that Coxe was not a competent witness, and not altogether entitled to credit. Clark's estate owed Coxe largely, and if Mrs. Gaines recovered, then Coxe expected to be benefited by the recovery. So that he was interested to uphold Mrs. Gaines' claim; nor has the deposition of Mr. Coxe been objected to; on the contrary, it is admitted by stipulation. R. 93.

Mr. Coxe's character for integrity is prominently manifest by sustaining facts.

Clark never admitted the marriage to any one entitled to credit, or who could be believed, when swearing to what a dead man had said.

He proposed to marry another lady in 1808, and Mrs. [ \* 630 ] Des \* Grange and Madame Despau came to Philadelphia, and sent for Mr. Coxe, then in partnership with Mr. Clark in large mercantile transactions, and inquired of him whether the fact was true. Coxe assented. Mrs. Des Grange said that Clark had *promised* to marry her, and that she then felt at liberty to marry herself; and soon after she was married to M. Gardette, a dentist of Philadelphia.

In 1805 Des Grange returned to New Orleans, and was sued by his wife for alimony. She recovered, and had a decree against him for five hundred dollars per annum. Mrs. Des Grange never assumed that Clark was her husband, so far as we are informed from any reliable source. She resided in Louisiana for many years, and until these proceedings had progressed for fifteen years and more, and could have deposed to the fact of marriage had her daughter seen proper to examine her as a witness; but this was not done.

It is altogether immaterial, however, whether Clark did or did not marry Des Grange's wife, as it could be of no value to the complainant if he did. Clark must have been an innocent and deluded



party to give Mrs. Gaines the benefit proposed by the will of 1813—as in case of an adventurer, from abroad, marrying an innocent single woman, leaving a wife behind him. There, the children of the second marriage cannot be disinherited and condemned; they can take as bastards from the mother. So the courts of Louisiana hold. But what are the facts here? Clark acted in concert with Mrs. Des Grange and her sisters in sending Des Grange to France, as agent of his wife's family, to settle up the affairs of an estate of theirs at Bordeaux. Des Grange was absent about fifteen months, and in the meantime, and shortly before the expiration of the time, Mrs. Des Grange was delivered of the child Caroline at Philadelphia, which Clark admitted at all times before his death was his child. This is an undisputed fact. Clark acted as the friend of Des Grange, and corresponded with him during his absence, and aided his wife. The criminal connection that was exposed by the birth of the child had obviously existed before Des Grange was sent to France; and in the transaction of sending him away and of prosecuting \*him on his return, Mrs. Des Grange, [\* 631] her two sisters, and Clark, were undoubtedly acting in conjunction. Madame Caillivet swears that she set on foot the prosecution against Des Grange. 12 How 509, 510.

That Des Grange had a wife living when he married the complainant's mother was a mere pretense to cover a nefarious transaction, as is abundantly established by the facts appearing in the case reported in 12 Howard. The idea, therefore, that Clark was an innocent and deluded party, is wholly inadmissible, and must be rejected as the least sustained part of this remarkable case.

I am of the opinion that the decree of the circuit court should be affirmed.

Mr. Justice GRIER dissenting.

I wholly dissent from the opinion of the majority of the court in this case, both as to the law and the facts. But I do not think it necessary to vindicate my opinion by again presenting to the public view a history of the scandalous gossip which has been buried under the dust of half a century, and which a proper feeling of delicacy should have suffered to remain so; I therefore dismiss the case, as I hope, for the last time, with the single remark, that if it be the law of Louisiana that a will can be established by the dim recollections, imaginations, or inventions of anile gossips, after forty-five years, to disturb the titles and possessions of *bona fide* purchasers, without notice, of an apparently indefeasible legal title, "*Haud equidem invideo, miror magis.*"



DECISIONS  
OF THE  
SUPREME COURT OF THE UNITED STATES,  
DECEMBER TERM, 1861.

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JUSTICES OF THE COURT.

HON. ROGER B. TANEY, CHIEF JUSTICE.

HON. JAMES M. WAYNE,

HON. JOHN CATRON,

HON. SAMUEL NELSON,

HON. ROBERT C. GRIER,

HON. NATHAN CLIFFORD,

HON. NOAH H. SWAYNE.

EDWARD BATES, ATTORNEY GENERAL.

WILLIAM THOMAS CARROLL, CLERK.

WARD H. LAMON, MARSHAL.

JEREMIAH S. BLACK, REPORTER.

ASSOCIATE JUSTICES.

At the beginning of this term there were three vacancies on the bench, occasioned by the death of Hon. P. V. DANIEL and Hon. JOHN MCLEAN, and the resignation of the Hon. JOHN A. CAMPBELL.

Hon. NOAH H. SWAYNE was appointed to succeed Judge MCLEAN, and took his seat during the term.

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DUTTON and others, Plaintiffs in Error, v. STRONG and another.

1 Black, 22.

RIPARIAN RIGHTS.

1. Bridge piers and landing places, as well as wharves and permanent piers, are often constructed by the riparian proprietor on the shore of navigable rivers, bays, and arms of the sea, as well as on the lakes; and where they conform to the regulations of the State, and do not extend below low-water mark, they are not nuisances, unless they are an obstruction to the paramount right of navigation.
2. The lakes are not navigable in any proper sense in certain places for a considerable distance from the shore; and when this is the case, the adjacent owner can make his pier; but this right terminates at the point of navigation.
3. Piers and wharves, though the property of an individual, may be either for public or private use, though generally for the public.
4. But a riparian owner may build one of these structures for his own exclusive use

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and benefit; and if confined to the shore of the sea or the unnavigable waters of the lake, no implication arises that it was constructed for public use.

5. When those in charge of a vessel had attached her, during a violent storm, to such a bridge pier by ropes and chains, and it became apparent that there was great danger of the destruction of the bridge pier by the vessel, the owners of the former had a right, after due warning, to cut the vessel loose, and are not responsible for her loss by her coming in contact immediately with another pier.

WRIT of error to the district court for the district of Wisconsin.  
The case is fully stated in the opinion.

*Mr. Doolittle*, for plaintiffs.

*Mr. Hibbard*, for defendants.

[ \* 26 ] \* Mr. Justice CLIFFORD delivered the opinion of the court.

This case comes before the court upon a writ of error to the district court of the United States for the district of Wisconsin. It was an action of trespass upon the case, and was instituted in the court below, on the seventh day of July, 1856, by the present defendants. They were the owners of a certain vessel called the *Homer Ramsdell*, and the plaintiffs in error, who were the defendants in the original suit, were the owners and occupants of a certain bridge pier, situated at Racine, in the State of Michigan, southerly of the harbor at that place. Like other similar

[ \* 27 ] erections, it was connected with the land at the \*margin of the lake, and extended into the water, so that vessels could approach it for the purpose of taking in freight, serving both as a wharf to the navigable water of the lake, and as a place of deposit for merchandise designed for transportation by water. As stated in the bill of exceptions, the defendants were forwarding merchants, and the case shows that they had used the bridge pier for the purpose of mooring vessels coming there in the course of their business; but it does not appear that it had ever been used for that purpose by any other persons. Another bridge pier, situated south of the one owned by the defendants, had been constructed, and was occupied by other parties, and was used for the same purpose by its owners as that of the defendants. According to the transcript, the declaration contained four counts, but they were all founded upon the same transaction. Three of the counts were substantially the same, and alleged, in effect, that the plaintiffs were the owners of the vessel; that, while she was lawfully employed in navigating the waters of Lake Michigan, she had, by stress of weather and the perils of navigation, been driven alongside of a certain dock and common mooring place at Racine, commonly called a bridge pier, to which she was then and there moored

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and fastened by cables and lines, and that the defendants, on the seventh day of May, 1855, wrongfully cut and severed the moorings by which the vessel was fastened, and cast her loose from the pier; and that, in consequence thereof, she was driven, by the force of the wind and waves, against a certain other dock and pier, there situate, and on to the shore of the lake, by reason whereof she was greatly damaged, and so injured that she sunk in the lake.

Unlike the first three counts, the fourth alleged that the defendants, at the same time and place, did, wrongfully and unlawfully, erect, and cause to be erected, a certain permanent bridge or structure on the navigable waters of Lake Michigan, whereby the vessel of the plaintiffs was wholly unable to make the harbor at Racine, or to put out into the lake, as she otherwise might and would have done; and in consequence of the obstruction, was by the wind and waves, driven on the shore, and against a certain dock, and greatly damaged, as \*alleged in the other [ \* 28 ] counts of the declaration. To the whole declaration, as more fully set forth in the transcript, the defendants pleaded that they were not guilty, and on that issue the parties went to trial. None of the evidence given by the defendants is reported in the bill of exceptions; but it appears, from that introduced by the plaintiffs, that the schooner was bound from Chicago, in the State of Illinois, to Racine, in the State of Wisconsin, and that she was sailing in ballast. Assuming the testimony of the master to be correct, she left Chicago on the sixth day of May, 1855, and arrived off the harbor of Racine between twelve and one o'clock at night in perfect safety. When she was about one-fourth of a mile from the harbor, the wind suddenly changed from south to north-northeast, and blew hard. Those in charge of the vessel state that they could see but one light at the time; supposing it to be the light on the northern pier in the harbor to which they were bound, they headed the vessel for that light. Contrary, however, to what they supposed, there was no light on either of the harbor piers, and, in point of fact, it was a light on the bridge pier of the defendants. Heading for that light, the vessel, as she advanced, was approaching the shore, and she soon passed between the two bridge piers, already described as situated southerly of the harbor. When they got close to the light they discovered the mistake; but, instead of changing the course of the vessel, they took in sail and let go the anchor, to prevent her from going on to the beach. Whether these precautions were the best that could have been adopted, or not, they had the effect to check the speed of the vessel, and, as she ceased to make headway, she sagged over against the southern bridge pier

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without receiving any injury. Their next step was to get out lines on to the bridge pier of the defendants, in order to work the vessel away from the southern pier, and prevent her from pounding. Finding that the lines were insufficient, they got out the large hawser and two other lines, and finally, with the aid of six additional men, and after getting out another hawser belonging to the vessel, and purchasing a new one for the purpose, they succeeded in getting the vessel up to the bridge pier of the defendants, or near it, at four o'clock in the morning. Her bow, as the master states, was still thirty or forty feet from the pier; and he says he bought the new line and employed the additional help to heave the vessel up to the pier, which was not fully accomplished until ten o'clock in the forenoon. Seeing that the wind and sea had increased in the meantime, they then concluded to make her fast to the pier; and, accordingly, got out the chain and fastened it to a pile on the opposite side of the pier, using, for that purpose, the hawsers and lines previously got out to work the vessel up to the pier. About twelve o'clock the vessel commenced pounding, and the pile to which the chain was attached started and passed through the pier eight or ten feet, and the clear inference from the testimony is, that all the fastenings gave way, except the new line and the chain.

Another witness, examined by the plaintiff, states that when the vessel commenced pounding, the pier began to start; and he says it was two o'clock in the afternoon when the pile to which the chain was attached gave way. Although it gave way, it did not then pass entirely through the bridge pier, but lodged against other piles on which the pier was built; and, consequently, the chain would still assist in holding the vessel, unless the pile broke, or that part of the pier was carried away. At this juncture, one of the defendants came upon the pier and directed the master to get the vessel away from the pier, informing him that if he did not he would cast her adrift; to which the master replied, that he would leave if possible; and if not, he would continue to hold on to the bridge pier. But he did not make any attempt to leave, and a person in the employment of the defendants cut the hawser. When the hawser was severed, and the strain came upon the chain, the second mate of the vessel says the rest of the piles gave way, and the vessel went over to the south bridge pier, carrying away her stanchions and bulwarks on her larboard side; and, to prevent further damage, she was scuttled, by the order of the master, and presently sunk. Such is the substance of the testimony introduced by the plaintiffs, as reported in the bill of exceptions.

Several prayers for instructions to the jury \*were pre- [ \*30 ] sented by the defendants, but, in the view we have taken of the case, it will only become necessary to refer to the second, and to the response given thereto by the court. By the second prayer of the defendants, the court was requested to instruct the jury, that if they believed, from the evidence, that it was material for the preservation of the pier to cut the vessel loose from it, the persons in charge of the pier had a right to do so, as against all rights of property in the vessel, after reasonable notice given, and request made and refused for the vessel to leave. But the court refused to give the instruction, as requested, and charged the jury, in substance, as follows: That if the vessel was attached to the pier towards its outer end, and was in peril, the owner of the pier could not put the vessel in greater peril by cutting her loose for the safety or protection of the pier. He also told the jury that the pier was run out into the lake for the accommodation of commerce, and was used as private property in public business; that the vessel was liable for such damage as she was doing the pier; and that the owners of the pier were not justifiable or excusable for cutting the vessel loose, even if it was material for them to do so for the safety or protection of the pier, or of that part to which the vessel was attached. Under the instructions of the court, the jury returned their verdict in favor of the plaintiffs, and the defendants excepted to the instructions given, and to the refusal of the court to instruct the jury as requested.

It is insisted by the defendants, that the district judge erred, as well in his refusal to instruct the jury as requested, as in the instructions given.

On the part of the plaintiffs, both of those propositions are controverted; and they contend, in the first place, that the bridge pier was a nuisance, because, as they insist, it was an obstruction to the public right of navigation; and secondly, they contend that the defendants had no right to cut the hawser, and cast the vessel adrift, however necessary it was for them to do so, for the safety and protection of the bridge pier, because, as they insist, the defendants, by erecting the pier in the waters of the lake, had impliedly licensed the plaintiffs, \*and all others navigating those [ \*31 ] waters, to come there with their vessels, and moor them to the pier; and that the license, of necessity, includes the right to use the pier, according to the exigencies of the case.

1. Unless it be true, that every landing place and bridge pier erected on the shore of navigable waters without a special authority from the legislature, is necessarily a nuisance, it is a sufficient an-

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swer to the first position of the plaintiffs to say, that there was not a particle of evidence in the case to support the theory of fact on which the proposition is based. All that appeared upon the subject in the court below was, that the bridge pier in question extended several hundred feet into the waters of the lake; but it was not even suggested that any less extension would have answered the purpose for which the pier was constructed, or that it was any greater than is usual in similar erections on that shore of the lake, or that the pier as constructed, constituted any obstruction whatever to the public right of navigation. On the contrary, the court adopted the theory that the vessel or her owners would be liable for the damage done to the pier, and sustained the right of the plaintiffs to recover, entirely upon the ground that the peril of the vessel justified the master in refusing to leave; and that the defendants, whatever might be the consequences to the pier if the vessel remained, had no right to cut the hawser, and thereby expose her to greater danger, notwithstanding they were in the possession of the pier, and it was admitted that it was their private property. Bridge piers and landing places, as well as wharves and permanent piers, are frequently constructed by the riparian proprietor on the shores of navigable rivers, bays, and arms of the sea, as well as on the lakes; and where they conform to the regulations of the State, and do not extend below low-water mark, it has never been held that they were a nuisance, unless it appeared that they were an obstruction to the paramount right of navigation. Whether a nuisance or not is a question of fact; and where they are confined to the shore, and no positive law or regulation was violated in their erection, the presumption is that they are not an obstruction, and he who alleges the contrary must prove [ \* 32 ] it. Wharves, \*quays, piers, and landing places, for the loading and unloading of vessels, were constructed in the navigable waters of the Atlantic States by riparian proprietors at a very early period in colonial times; and, in point of fact, the right to build such erections, subject to the limitations before mentioned, has been claimed and exercised by the owner of the adjacent land from the first settlement of the country to the present time. (Ang. on Tide Wat. p. 196.)

Our ancestors, when they immigrated here, undoubtedly brought the common law with them, as part of their inheritance; but they soon found it indispensable, in order to secure these conveniences, to sanction the appropriation of the soil between high and low-water mark to the accomplishment of these objects. Different States adopted different regulations upon the subject; and, in some,



the right of the riparian proprietor rests upon immemorial local usage. No reason is perceived why the same general principle should not be applicable to the lakes, although those waters are not affected by the ebb and flow of the tide; and consequently the terms "high and low water mark" are not strictly applicable. But the lakes are not navigable, in any proper sense, at least in certain places, for a considerable distance from the margin of the water. Wherever the water of the shore, so to speak, is too shoal to be navigable, there is the same necessity for such erections as in the bays and arms of the sea; and where that necessity exists, it is difficult to see any reason for denying to the adjacent owner the right to supply it; but the right must be understood as terminating at the point of navigability, where the necessity for such erections ordinarily ceases.

2. Piers or landing places, and even wharves, may be private, or they may be in their nature public, although the property may be in an individual owner; or, in other words, the owner may have the right to the exclusive enjoyment of the structure, and to exclude all other persons from its use; or he may be under obligation to concede to others the privilege of landing their goods, or of mooring their vessels there, upon the payment of a reasonable compensation as wharfage; and whether they are the one or the other may depend, in case \*of dispute, upon several [ \* 33 ] considerations, involving the purpose for which they were built, the uses to which they have been applied, the place where located, and the nature and character of the structure. Undoubtedly, a riparian proprietor may construct any one of these improvements for his own exclusive use and benefit; and, if not located in a harbor, or other usual resting place for vessels, and if confined within the shore of the sea or the unnavigable waters of a lake, and it had not been used by others, or held out as intended for such use, no implication would arise, in a case like the present, that the owner had consented to the mooring of the vessel to the bridge-pier.

Looking at the statement of the facts, as derived from the evidence reported in the bill of exceptions, it is obvious, that every one of the foregoing conditions substantially concur in this case; and, consequently, it must be assumed that the master attached the vessel to the pier without any authority from the defendants, either express or implied. He had no business to transact with the plaintiff, and the vessel was not going to the pier for freight; so that all pretense of a license utterly fails.

That fact alone, however, under the circumstances of this case,

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might not perhaps be sufficient to justify or excuse the defendants for cutting the hawser. Every man is bound by law so to use his own property as not to injure the property of another; and, unless the defendants are brought within the fair operation of that rule, they cannot be justified or excused. But that rule is applicable to the plaintiffs as well as to the defendants; and he who would invoke the benefit of the rule must first comply with its requisitions.

Failing to show a license to attach the vessel to the pier, the plaintiffs set up the peril of the vessel, and insist that she had a right to remain, notwithstanding the request to leave, during its continuance; and, consequently, that the defendants cannot be justified or excused for cutting her loose.

Suppose the right to remain during the continuance of the peril, if she could have done so without danger or injury to the property of the defendants, be admitted, still the admission [ \* 34 ] \* would not benefit the plaintiffs in this case, for the reason that they or their agent had wrongfully attached the vessel to the pier; and when it became obvious that the necessary effect of the trespass, if suffered to be continued, would be to endanger and injure, or perhaps destroy the pier, the peril of the vessel imposed no obligations upon the defendants to allow her to remain, and take the hazard that their own property would be sacrificed in the effort to save the property of wrong-doers. On the contrary, they had a clear right to interpose, and disengage the vessel from the pier to which she had been wrongfully attached, as the only means in their power to relieve their property from the impending danger. They had never consented to incur that danger, and were not in fault on account of the insufficiency of the pier to hold the vessel, because it had not been erected or designed as a mooring place for vessels in rough weather, and it was the fault of the plaintiffs or their agent that the vessel was placed in that situation.

Reference is made by the plaintiffs to the case of *Heaney et al. v. Heaney et al.*, (2 Den. 625,) as asserting a contrary doctrine; but, after a careful examination of the case, we think it will not bear any such construction. Recurring to the facts of the case, it will be seen that the litigation arose out of a dispute about the title of the dock before it was completed. With a view to get possession of the dock, the plaintiffs attached their vessel to it, and the defendants, who had previously had the possession, severed the fastenings and cast her loose at a time when there was no danger whatever to the dock; and it was held that, inasmuch as the occupancy of the plaintiffs was lawful, the defendants could not terminate it by set-

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ting the vessel adrift, so as to endanger her safety, until they had put the plaintiffs in fault. But the court admitted that if the entry of the plaintiffs into the dock had been tortious, then, indeed, the defendants would have had a right to cut her loose, doing no unnecessary damage, in order to the enjoyment of their rights.

In view of the whole case, we are of the opinion that the second prayer for instruction, presented by the defendants, should have been adopted by the court, and that the \*instruc- [ \* 35 ] tions given to the jury in answer to their request were also erroneous.

Judgment of the district court reversed, with costs, and the cause remanded, with directions to issue a *venire facias de novo*.

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THE UNITED STATES v. HENSLEY.

1 Black, 35.

CALIFORNIA LAND GRANTS.

IN this case the court simply refers to and affirms its former decisions adverse to the general title of Sutter. It need be reported no further.

\* Mr. Justice GRIER delivered the opinion of the court. [ \* 37 ]

The claim of the appellee in this case is under the deed of Micheltorena, dated the 22d of December, 1844, commonly called the Sutter general title. It differs in no material respect from the other titles or claims already adjudged by this court, in which this grant was in question. The cases of *U. S. v. Nye*, (21 How. 408;) *Same v. Bassett*, (ib. 412;) *Same v. Bennitz*, (23 How. 255;) *Same v. Rose*, (ib. 262,) settle the question that the claim of the appellee is invalid. The decree of the district court is therefore reversed, \* and the cause remanded, with directions to [ \* 38 ] that court to dismiss the petition. Decree accordingly.

1b 38  
L-ed 52  
131 colv

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BACON and others, Plaintiffs in Error, v. HART.

1 Black, 38.

PRACTICE IN SUPREME COURT—SERVICE OF CITATION.

1. Service of citation on a writ of error, where the defendant in error is dead, cannot be legally made on the widow or executor of his attorney in the court below, who is also dead.
2. Nor is it sufficient that it was served on the law partner of the deceased attorney,

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unless the name of the latter appeared of record as attorney in the case. This court does not take judicial notice of law partnerships in practice in the courts.

*Mr. Stanton* moved to dismiss the writ for want of service of citation. The matter is well stated in the opinion.

Mr. Chief Justice TANNEY delivered the opinion of the court.

We have looked into this record, and find that the writ of error must be dismissed. The action was in the nature of an ejectment, and brought to recover possession of land. The plaintiff below was William Hart, *junior*, a citizen of New York, residing at Manilla. His counsel in the cause was William Hart, *senior*. In March, 1858, judgment was rendered by the court for the plaintiff. In October of the same year a writ of error was sued out, returnable on the first Monday in December next thereafter, and service of the citation was on the 9th of October admitted by William Hart, *senior*. But this writ of error was not returned during the term to which it was made returnable, and failed, therefore, to bring up the case. A second writ of error was taken by the defendant below in August, 1859, returnable to the ensuing December term of this court. The

[ \* 39 ] citation under \* this latter writ was directed to William Hart, *junior*, and served according to the marshal's certificate, on Mary Hart, widow and executrix of William Hart, *senior*, who died after the judgment, and on J. D. Stevenson, his former law partner.

A service of the citation on the attorney or counsel of the proper party is sufficient; but the executrix of the counsel on record was not the counsel of her testator's client. His character and duties as counsel did not devolve on his own personal representative after his death. Nor is Mr. Stevenson to be regarded as the counsel of William Hart, *junior*, merely because he had been the partner of William Hart, *senior*. We cannot notice law partnerships or other private relations between members of the bar. This may have been a partnership, solely because it provided for a division of profits, without putting either partner under any responsibility for the suits conducted by the other. The courts can know no counsel in a cause except those who regularly appear as such on the record.

The citation not being served on the party as his counsel, the cause is not brought into this court, agreeably to the act of 1789; and the writ must therefore be dismissed for want of jurisdiction.

Writ of error dismissed.

## WEIGHTMAN, Plaintiff in Error, v. THE CITY OF WASHINGTON.

1 Black, 39.

1b 39  
L-ed 52  
38f 204

## LIABILITY OF MUNICIPAL CORPORATION TO KEEP ITS BRIDGES IN REPAIR.

1. Where a municipal corporation is required by law to perform certain duties for the general interest, as to build bridges and the like, and is furnished with the necessary means and authority to perform the duty well, they are responsible for injuries arising from the neglect of such duties.
2. A like responsibility exists for carelessness and neglect in the manner of performing such duties. Hence, when the corporation of Washington built a bridge so unskillfully, negligently, and carelessly that it fell and injured a passenger over it, the city is responsible in damages for the injury he sustained.

WRIT of error to the circuit court for the District of Columbia.  
The case is very fully stated in the opinion.

*Mr. Bradley and Mr. Carlisle*, for plaintiff.

*Mr. Davidge*, for defendant.

\* Mr. Justice CLIFFORD delivered the opinion of the court. [ \* 45 ]

This is a writ of error to the circuit court of the United States for the District of Columbia.

According to the transcript, the action was trespass on the case, and was brought by the plaintiff, to recover damages against the corporation, defendants, on account of certain personal injuries sustained by him from the falling of a certain bridge constructed by the authorities of the corporation, and which, as he alleged, they were bound to keep in good repair, and safe and convenient for travel.

Referring to the declaration, it will be seen that the plaintiff alleged, in substance and effect, that, at the time and long \* before the bringing of the suit, there was and still is a [ \* 46 ] certain common and public bridge over Rock creek leading from K street north, in the city of Washington, to Water street in Georgetown, and that the defendants had been accustomed to keep the same in repair, and, of right, ought to have made such repairs to the same as to have rendered it safe and convenient for travel for the citizens generally, whether on foot, or with their horses, carts, carriages, or other vehicles; nevertheless, the plaintiff averred that the bridge, on the twentieth day of May, 1854, was in an insecure, unsafe, and dangerous condition, by reason of the default and negligence of the defendants, so that, while the plaintiff was then and there lawfully passing over and across the same, in an ordinary vehicle, the bridge, in consequence of its un-

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*Weightman v. The City of Washington.*

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safe and insecure condition, and of the default and negligence of the defendants, broke, gave way, and fell in, whereby the plaintiff was, with great force, thrown and precipitated into the creek, and received the injuries particularly described in the declaration.

Issue was duly joined between the parties, upon the plea of not guilty filed by the defendants, and upon that issue the parties went to trial. Evidence was introduced by the plaintiff, showing that he was returning from Georgetown to the city of Washington at the time the accident occurred, and was riding in one of the omnibuses running between the two cities; that while crossing the bridge in the omnibus the bridge gave way and fell, and the vehicle, with the plaintiff in it, was precipitated into the creek, whereby he narrowly escaped drowning. His left arm was broken and his left hand crushed; and the statement of the bill of exceptions is, that "the hand and arm have been rendered useless for life." He was also seriously bruised; and his injuries were of such a character that he was confined thereby to his house for a long time, under medical attendance; and the case shows that, throughout the whole of that period of time, he suffered great bodily pain.

On the other hand, evidence was given by the defendants that, before any plan of the contemplated structure was adopted, they passed an ordinance, raising a committee to advertise for proposals for the erection of the abutments and construction [ \* 47 ] \* of the bridge. That committee consisted of the mayor and two other members of the council; and the evidence offered by the defendants tended to show that they took the opinion of scientific men upon the subject, before they approved the plan under which the bridge was built, and that the defendants acted in good faith throughout, and with a view of building a bridge suitable, in all respects, for the purposes for which it was required. They also offered evidence tending to show that the materials of the bridge were of the best description, that the work was carefully examined by their agents as the same was done, and that the giving way of the bridge was solely the result of accident, arising from a defect in the plan under which it was constructed. After the bridge was built, the defendants passed another ordinance, appointing a commissioner to inspect the bridge; and they introduced evidence tending so show that he never ascertained or reported to them that the bridge was unsafe, defective, and out of repair; and they insisted at the trial, and offered evidence tending to prove, that they had no notice from that officer, or otherwise, that the bridge was insecure, unsafe, or defective, either in principle or in fact.

Rebutting evidence was then given by the plaintiff, showing

that the bridge was an iron bridge, with a single span of more than a hundred feet; that it was constructed on the plan of Rider's patent, and was built by the inventor of that improvement. He also gave evidence tending to prove that one of the scientific persons, whose opinion was sought by the committee appointed under the first ordinance, stated to the defendants, at the time he was consulted, to the effect that, although the principle of the plan was correct, still it could not be applied indefinitely to iron bridges; that the arch of the bridge was higher than had ever before been attempted, and that the contractor remonstrated against building it so high, but that the defendants required it to be so constructed; and he also proved that the contractor was still of the opinion that the bridge fell in consequence of the height of the arch. One of the committee, also, was examined by the plaintiff, and he testified that he was not consulted about the plan; that, \*although he believed it to be a good one at the time, he [ \* 48 ] is now satisfied that it was essentially and radically defective. He also examined the commissioner of the first ward, who testified that he crossed the bridge a few days before the accident occurred, and that it was so tremulous and shook so violently that he was apprehensive it would fall; and divers other witnesses testified that, for several days before the bridge fell, they had observed that several of the braces were broken, and some of the wedges had fallen out, and the bridge was loose and shook greatly when carriages passed over it.

At the prayer of the defendants the court instructed the jury that, upon the whole evidence, the plaintiff could not recover in this action, and the plaintiff excepted. Under the instructions of the court, the jury returned their verdict in favor of the defendants.

1. Looking at the whole evidence, it is obvious that the charge of the court cannot be regarded as correct, unless it be true, as is contended by the defendants, that they are not responsible in damages to an individual for injuries received by him in crossing the bridge, although it may appear that the injuries were received without any fault of the complaining party, and were occasioned solely through the defect of the bridge, and the default and negligence of the defendants. It is conceded that the defendants were bound by their charter to maintain the bridge and keep it in repair; and it is fully proved, and not denied, that it was defective and very much out of repair at the time the accident occurred. Full and uncontradicted proof was also adduced by the plaintiff that he was seriously and permanently injured; and it is not possible to doubt, from the evidence, that his injuries were received

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without any fault of his own, and solely through the insufficiency of the bridge and its want of repair. Want of ordinary care on the part of the plaintiff was not even suggested at the trial, and the circumstances disclosed in the evidence afford no ground whatever for any such inference.

Having shown these facts, it only remained for the plaintiff to prove if the defendants, under any circumstances, are responsible, in this form of action, for such an injury, that they [ \* 49 ] \*were in default, and had been guilty of negligence in suffering the bridge to continue open for public travel while it was known to be out of repair and insecure. Both sides introduced testimony on this point, but the charge of the court withdrew entirely the plaintiff's evidence from the consideration of the jury. Where there is no evidence to sustain the action, or one of its essential elements, the court is bound so to instruct the jury; but where there is evidence tending to prove the entire issue, it is not competent for the court, although the evidence may be conflicting, to give an instruction which shall take from the jury the right of weighing the evidence and determining its force and effect, for the reason that, by all the authorities, they are the judges of the credibility of the witnesses, and the force and effect of the testimony. *Greenleaf v. Birth*, (9 Pet. 299;) *Bank of Washington v. Triplet et al.* (1 Pet. 31.) Applying that rule to the present case, it is clear, in view of what has already been stated, that the charge of the court cannot be sustained, if the defendants are liable in this form of action, under any circumstances, for such an injury.

2. It is not, however, upon any such ground that the defendants attempt to sustain the instruction, but they insist that, being a municipal corporation, created by an act of congress, they are invested with the power over the bridge merely as agents of the public, from public considerations and for public purposes exclusively, and they are not responsible for the nonfeasances or misfeasances of the persons necessarily employed by them to accomplish the object for which the power was granted. Municipal corporations undoubtedly are invested with certain powers, which, from their nature, are discretionary, such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen, and for many other useful and important objects within the scope of their charters. Such powers are generally regarded as discretionary, because, in their nature, they are legislative; and although it is the [ \* 50 ] duty of such corporations to carry out the \*powers so



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granted and make them beneficial, still it has never been held that an action on the case would lie against the corporation, at the suit of an individual, for the failure on their part to perform such a duty. But the duties arising under such grants are necessarily undefined, and, in many respects, imperfect in their obligation, and they must not be confounded with the burdens imposed, and the consequent responsibilities arising, under another class of powers usually to be found in such charters, where a specific and clearly-defined duty is enjoined in consideration of the privileges and immunities which the act of incorporation confers and secures. Where such a duty of general interest is enjoined, and it appears, from a view of the several provisions of the charter, that the burden was imposed in consideration of the privileges granted and accepted, and the means to perform the duty are placed at the disposal of the corporation, or are within their control, they are clearly liable to the public if they unreasonably neglect to comply with the requirement of the charter; and it is equally clear, when all the foregoing conditions concur, that, like individuals, they are also liable for injuries to person or property arising from neglect to perform the duty enjoined, or from negligence and unskillfulness in its performance. At one time it was held that an action on the case for a tort could not be maintained against a corporation; and, indeed, it was doubted whether assumpsit would lie against a corporation aggregate, since, it was said, the corporation could only bind itself under seal; but courts of justice have long since come to a different conclusion on both points, and it is now well settled that corporations, as a general rule, may contract by parol, and, like individuals, they are liable for the negligent and unskillful acts of their servants and agents, whenever those acts occasion special injury to the person or property of another. Whether the action in this case is maintainable against the defendants or not, depends upon the terms and conditions of their charter, as is obvious from the views already advanced.

By the second section of their charter it is provided, among other things, that they shall continue to be a body politic and corporate, \* \* \* "and, by their corporate name, may sue and \*be sued, implead and be impleaded, grant, receive, and do [ \* 51 ] all other acts as natural persons." They may purchase and hold real, personal, and mixed property, and dispose of the same for the benefit of the city. Large and valuable privileges also are conferred upon the defendants; and the thirteenth section of the charter provides, in effect, that the defendants shall have the sole control and management of the bridge in question, \* \* \*

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“and shall be chargeable with the expense of keeping the same in repair, and rebuilding it when necessary.” Comment upon the provision is unnecessary, as it is obvious that the duty enjoined is as specific and complete as our language can make it; and it is equally clear, that the bridge is placed under the sole control and management of the defendants; and, in view of the several provisions of the charter, not a doubt is entertained that the burden of repairing or rebuilding the bridge was imposed upon the defendants, in consideration of the privileges and immunities conferred by the charter. Most ample means, also, are placed at the disposal of the defendants, or within their control, to enable them to perform the duty enjoined. Whatever difference of opinion there may be as to the other conditions required to fix the liability, on this one, it would seem, there can be none, as the defendants have very large powers to lay and collect taxes on almost every description of property, real and personal, as well as on stocks and bonds and mortgages, and they also derive means for the use of the city from granting licenses, and from the rents and profits of real estate which they own and hold. All the conditions of liability, therefore, as previously explained, concur in this case.

It is supposed by the defendants, that the decision of this court in *The City of Providence v. Clapp*, (17 How. 161,) is opposed to the right of the plaintiff to maintain this action; but we think otherwise. Injury had been received by the plaintiff in that case, in consequence of one of the principal streets of the city having been blocked up and encumbered with snow; and the principal question was, whether such an obstruction was one within the meaning of the statute of the State on which the action [ \* 52 ] was founded; and the court held that the city was \* liable.

Cities and towns are required by statute, in most or all of the northeastern States, to keep their highways safe and convenient for travelers by day and by night; and if they neglect that duty, and suffer them to get out of repair and defective, and any one receives injury through such defect, either to his person or property, the delinquent corporation is responsible in damages to the injured party. No one, however, can maintain an action against the corporation grounded solely on the defect and want of repair of the highway, but he must also allege and prove that the corporation had notice of the defect or want of repair, and that he was injured, either in person or property, in consequence of the unsafe and inconvenient state of the highway. Duty to repair, in such cases, is a duty owed to the public, and consequently, if one person might sue for his proportion of the damages for the non-performance of the

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duty, then every member of the community would have the same right of action, which would be ruinous to the corporation ; and, for that reason, it was held, at common law, that no action, founded merely on the neglect to repair, would lie. It was a sound rule of law, and prevails everywhere to the present time. Reference is often made to the case of *Russell v. The Men of Devon*, (2 Term, 667,) as an authority to show that no action will lie against a municipal corporation in a case like the present ; but it is a misapplication of the doctrine there laid down. Suit was brought, in that case, against the inhabitants of a district, called a county, where there was no act of incorporation, and the court held that the action would not lie ; admitting, however, at the same time, that the rule was otherwise in respect to corporations. But whether that be so or not, the rule here adopted has been fully sanctioned in all the English courts. *Henley v. The Mayor, &c. of Lyme*, (5 Bing. 91.) It was ruled in the common pleas by Best, Ch. J., and the case was then removed into the king's bench by writ of error, and was then decided by Lord Tenderden and his associates in the same way. *Same v. Same*, (3 Barn. & Adol. 77.)

Judgment of affirmance having been given in the king's bench, the cause was removed to the house of lords by another writ of error, sued out by the same party. Baron Parke \* gave [ \* 53 ] the opinion on the occasion, all of the other judges and the lord chancellor concurring. Among other things, he said that, in order to make good the declaration, it must appear, first, that the corporation is under a legal obligation to repair the place in question ; secondly, that such obligation is matter of so general and public concern that an indictment would lie against the corporation for non-repair ; thirdly, that the place in question is out of repair ; and lastly, that the plaintiff has sustained some peculiar damage beyond the rest of the king's subjects by such want of repair ; and after explaining these several conditions, and showing that the case fell within the principles laid down, he stated that it was clear and undoubted law, that wherever an indictment would lie for non-repair, an action on the case would lie at the suit of a party sustaining any peculiar damage. *Mayor of Lyme Regis v. Henley*, (2 Cl. and Fin. 331.) Numerous decisions have, since that time, been made by the courts in this country, approving the rule laid down in that case, and applying it to cases like the present. *Erie v. Schwingle*, (22 Penn. 384 ; ) *Storrs v. The City of Utica*, (17 N. Y. 104 ; ) *Conrad v. The Trustees of Ithaca*, (16 N. Y. 159 ; ) *Browning v. The City of Springfield*, (17 Illinois, 143 ; ) *Hutson v. The City of N. Y.* (5 Sand. S. C. R. 289 ; ) *Lloyd v. The Mayor, &c. of the City*

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of N. Y. (1 Seld. 369;) *Wilson v. City of N. Y.* (1 Denn. 595; 2 Denn. 450;) *Rochester White Lead Co. v. The City of Rochester*, (3 Conn. 463;) *Smoot v. The Mayor, &c. of Wetumpka*, (24 Ala. 112;) *Hicocke v. The Trustees of the Village of Plattsburg*, (15 Barb. S. C. 427;) *Mayor, &c. of N. Y. v. Furze*, (3 Hill, 612.) Contrary decisions, undoubtedly, are to be found, but most of the cases are based upon a misapplication of what was decided in *Russell v. The Men of Devon*, to which reference has already been made, and which is certainly not an authority for any such doctrine at the present time. In view of the whole case, we are of the opinion that the charge of the circuit court was erroneous, and the judgment is accordingly reversed with costs, and the cause remanded, with directions to issue a new venire.

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THE WABASH AND ERIE CANAL COMPANY, Appellants, v. BEERS.

1 Black, 54.

## JURISDICTION OF SUPREME COURT—FINAL DECREE.

A decree which directs the absolute payment of a sum of money into court for the plaintiff is a final decree from which an appeal lies.

APPEAL from the circuit court for the district of Indiana.

*Mr. Gillet* moved to dismiss the appeal.

*Mr. Usher, per contra.*

[ \* 55 ] \* Mr. Chief Justice TANEY delivered the opinion of the court.

This decree is final. It is decisive of the case made upon record. It is positive, and not alternative. It leaves no question of right between the parties open for future adjudication. The decree orders the money to be brought into court within a limited time, and the court warns the defendants that if they fail or make default a particular measure will be taken to compel obedience. There is no want of finality here. The motion is denied.

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THE UNITED STATES, Plaintiffs in Error, v. L. W. BABBIT and others.

1 Black, 55.

## FEES AND COMPENSATION OF REGISTER AND RECEIVER.

1. The proviso in the act of March 22, 1852, that no register or receiver shall receive, during any one year, a greater compensation than the maximum allowed by law, is

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prospective; and the allowance of fees for certain services made by subsequent statutes will not affect the limit of his compensation.

2. That limit is \$3,000; and the acts allowing fees for locating military land warrants, passed subsequently, do not authorize those officers to retain or receive more than that sum.

WRIT of error to the district court for the district of Iowa. The case is sufficiently stated in the opinion.

*Mr. Bates*, attorney general, for plaintiff.

*Mr. Reverdy Johnson* and *Mr. Gillet*, for defendants.

\* Mr. Justice SWAYNE delivered the opinion of the court. [ \* 56 ]

This was an action in the court below, upon the official bond of the defendant, Babbitt, as register of the land office of Kanesville, in the State of Iowa. The bond bears date on the 9th day of May, 1853. The petition, we are advised, is according to the practice in the courts of that State. It sets out a copy of the bond, and alleges, as a breach, that Babbitt, "as such receiver, and by virtue of his office, to wit, from the 6th day of April, 1853, to the 20th day of October, 1856, received, as fees for the location of military \* bounty land warrants, under the [ \* 57 ] provisions of the acts of congress approved 11th of February 1847, 25th of September, 1850, 22d of March, 1852, and 3d of March, 1855, the sum total of \$13,879.08; and that sum the said Babbitt still holds, and refuses to pay to the plaintiffs, though often requested and directed by the proper officers to do so—the sum of nine thousand eight hundred and sixteen dollars and twenty-four cents."

The pleader has annexed to, and made a part of the petition, a treasury transcript of the accounts of the register, showing the balance against him claimed by the plaintiffs.

The defendants demurred, and assigned for causes :

1. That the petition was so defective in form that the plaintiffs could not, by law, maintain their action.
2. That the petition did not set forth a cause of action in proper form.
3. That no cause of action was set forth in the petition; for that, by law, the defendant Babbitt was entitled to retain the said moneys received by him, as fees of office, and was not bound to account to the plaintiffs for the same.

The petition is in striking contrast with the brevity and clearness of the common-law forms in like cases. It contains, however, all the substantial elements of a good declaration, and sufficiently discloses the cause of action which the pleader designed to present.

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This brings us to the consideration of the main question in the case, which is, whether the defendant Babbit is entitled to retain, for his own use, the fees in controversy? The proper solution of this question must depend upon a careful examination of the acts of congress to which our attention has been called.

The act of April 20, 1818, (3 Stat. 466,) provides: "That, instead of the compensation now allowed by law to the registers of the land offices, they shall receive an annual salary of five hundred dollars each, and a commission of one per centum upon all moneys expressed in the receipts by them filed and entered, and of which they shall have transmitted an account to the secretary of the treasury: *Provided*, That the whole amount which [ \* 58 ] any register of the land offices shall receive \* under the provisions of this act shall not exceed, for any one year, the sum of three thousand dollars."

The act of February 11, 1847, (9 Stat. 125,) gave to certain non-commissioned officers, musicians, and privates in the Mexican war, each one hundred and sixty acres of land. This act makes no provision for fees.

The act of May 17, 1848, (9 Stat. 231,) authorized registers and receivers to receive from the holders of warrants the fees therein specified, for their services in carrying out the provisions of the act of 1847, with a proviso, that where the warrant was located for the use of the volunteer to whom it was issued, no compensation should be charged either by the register or receiver.

The act of September 28, 1850, (9 Stat. 520,) authorized the issuing of bounty land warrants to the soldiers who performed military service in the war of 1812, or in any of the Indian wars since 1790, and to the commissioned officers in the Mexican war. This act made no provision for fees; but, on the contrary, directed the locations to be made "free of expense."

The act of March 22, 1852, (10 Stat. 4,) extends the benefits of the act of 1850 to all cases where the militia or volunteers of any State or territory were called into military service and paid by the United States, subsequent to the 18th of June, 1812.

The second and third sections of that act are as follows:

"Sec. 2. That the registers and receivers of the land offices shall hereafter be severally authorized to charge and receive for their services, in locating all military bounty land warrants issued since the 11th day of February, 1847, the same compensation or percentage to which they are entitled by law for sales of public lands for cash, at the rate of \$1.25 per acre, the said compensation to be hereafter paid by the assignees or holders of such warrants.

"SEC. 3. That registers and receivers, whether in or out of office at the passage of this act, or their legal representatives in case of death, shall be entitled to receive from the treasury of the United States, for services heretofore performed in \* 10- [ \* 59 ] cating military bounty land warrants, the same rate of compensation provided in the preceding section for services hereafter to be performed, after deducting the amount already received by such officers under the act entitled 'An act to require the holders of military land warrants to compensate the land officers,' &c., approved May 17, 1848: *Provided*, That no register or receiver shall receive any compensation out of the treasury for past services, who has charged and received illegal fees for the location of such warrants: *And provided, further*, That no register or receiver shall receive for his services, during any year, a greater compensation than the maximum now allowed by law."

The appropriation act of March 3, 1853, (10 Stat. 224,) contains at its close the following proviso:

"That whenever the amount received at any United States land office, under the third section of an act entitled 'An act to make land warrants assignable, and for other purposes,' approved March 22, 1852, has exceeded or shall exceed the amount which the registers and receivers at any such office are entitled to receive under said third section, the surplus which shall remain, after paying the amount so due as aforesaid to said registers and receivers, shall be paid into the treasury of the United States as other public moneys."

The act of March 3, 1855, (10 Stat. 635,) provides:

"That each register of a land office and receiver of public moneys shall receive the same amount of pay for each and every entry of land made under the graduation act of 1854, as such officer is by law entitled to receive for similar entries of land at the minimum price of one dollar and twenty-five cents per acre: *Provided*, That the whole amount received per year shall in no case exceed the limitation fixed by existing laws."

By another act of the same date as the preceding act, (10 Stat. 701,) it is provided:

"That the registers and receivers of the several land offices shall be severally authorized to *charge and receive for their services*, in locating all warrants under the provisions of this act, the same compensation or percentage to which they are entitled \* by law for the sales of public lands for cash, at the rate [ \* 60 ] of one dollar and twenty-five cents per acre, the said compensation to be *paid by the assignees or holders of such warrants*."

The general appropriation act of August 18, 1856, (11 Stat. 91,) provides:

"That, in the settlement of the accounts of registers and receivers of the public land offices, the secretary of the interior be authorized to allow, subject to the approval of congress, such reasonable compensation for additional clerical services and extraordinary expenses incident to said offices as he shall think just and proper, and report to congress all such cases of allowance at each succeeding session, with estimates of the sum or sums required to pay the same."

The act of March 3, 1853, (10 Stat. 245,) fixes the salaries of registers and receivers in California at \$3,000 each, and prohibits them from receiving any percentage or fees, except for deciding pre-emption cases.

The act of July 17, 1854, (10 Stat. 306,) limits the salaries of the registers and receivers of Oregon and Washington territories each to \$2,500 per annum, and office rent, and prohibits them from receiving fees or emoluments of any kind, except the receivers' necessary expenses for depositing moneys.

The act of July 12, 1858, (11 Stat. 325,) gives the same compensation to registers and receivers in New Mexico which those officers receive in Washington territory, with a proviso, that their compensation, including fees, shall not exceed \$3,000 each per annum.

This is the legislation, by the light of which we are to make up our judgment in this case.

It is a rule in the construction of statutes, that all relating to the same subject-matter shall be considered together.

The act of 1818 fixes a specific sum as the maximum amount which registers shall be permitted to receive. Whenever congress has spoken upon the subject since that time, the same policy has been adhered to. This remark applies to this class of officers alike in the Atlantic and Pacific States and territories. The act of 1856 provides a mode of compensating them "for additional clerical services and extraordinary expenses."

[ \*61 ] \*The act of 1852 provides for the compensation, upon the basis of fees, of registers who had gone out of office, and of those who were then in office. The latter, for future, as well as past services, were limited to the maximum then "allowed by law," which was three thousand dollars per annum.

It would be singular if one rate of compensation were provided for those *then* in office, and their predecessors, and another and a different one in respect of their successors, for the same services, rendered under the same circumstances. It is insisted by the



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counsel for the defendants in error that this is a necessary result, because the proviso at the end of the third section of this act, which imposes the limitation, is confined, in its operation, to the cases mentioned in the previous part of the same section. If this were so, the result claimed would not necessarily follow. In that case, we should find no difficulty in holding it to be clearly implied that the same rule of compensation should apply to their successors as to the then incumbents and their predecessors. What is implied in a statute, pleading, contract, or will, is as much a part of it as what is expressed. (2 Paine's Rep. 251,) *Koning v. Bayard*; (3 Wend. 258,) *Haight v. Holley*; (10 Wend. 218,) *Rogers v. Kne-land*; (20 Wend. 447,) *Fox v. Phelps*; (Com. Dig. tit. DEVISE, n. 12.)

"A thing within the intention of the makers of the statute is as much within the statute as if it were within the letter." (Plow. 366,) *Zouch v. Stowell*; (3 How. 565,) *U. S. v. Freeman*.

But we do not place our decision upon this ground. We are of opinion that the proviso referred to *is not* limited in its effect to the section where it is found, but that it was affirmed by congress as an independent proposition, and applies alike to all officers of this class.

Whether the proviso in the appropriation act of 1856 is to be construed as referring to the 3d section of the act of 1852, according to its letter, or to the 2d section, as is claimed in behalf of the government, we have not found it necessary to consider.

The views we have expressed are sufficient to decide this \*case. They conduct us to the conclusion, that the [ \* 62 ] court below erred in sustaining the demurrer.

Judgment of the district court reversed, and cause remanded, with directions to proceed in conformity to the opinion of the supreme court.

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THE STEAMER NEW PHILADELPHIA.

THE CAMDEN AND AMBOY RAILROAD COMPANY, Appellants, v. PATRICK BRADY and others.

1 Black, 62.

COLLISION—TOW-BOAT AND TOW.

1. A tug having a barge with many others in tow, held, on a minute examination of much testimony, to be in fault for bringing the barge, while landing her, into collision with a sloop, whereby the barge was so injured that it afterwards sunk.

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2. The schooner had a right to use a fender to keep off the barge; and though this may have contributed to the injury to the barge, it does not follow she should pay part of the loss.
3. If, in a suit against the schooner, she might be held liable, that is no defense, as this suit is founded on her carelessness in executing her contract to tow the barge safely and skillfully.
4. Where an appellant, after he had taken exception to the amount of damages in the master's report, had admitted the amount to be correct, for the purpose of making the sum sufficient for allowance of an appeal, he will not be heard in this court to controvert that amount.

APPEAL from the circuit court for the southern district of New York, in admiralty. The case is fully stated in the opinion.

*Mr. Murray*, for appellants.

*Mr. Burrell*, for defendants.

[ \* 66 ] \*Mr. Justice WAYNE delivered the opinion of the court.

This is an appeal in admiralty from the circuit court of the United States for the southern district of New York.

It has been argued with minuteness and ability by the proctors of the parties, as well in respect to the allegations of the libel and answer, as to the incidents of its trials in the circuit and district courts. The case has had our best consideration.

The libel sets forth that Patrick Brady was the owner of the barge Owen Gorman, and that, on the 12th April, 1856, she left Richmond, in Pennsylvania, for Brooklyn, New York, under the command of Patrick Campbell, with a cargo of 207½ tons of coal; that, on the 17th of April, the barge and eleven other barges were towed from the Delaware and Raritan canal, at New Brunswick, by the steamer New Philadelphia, into the waters of the Hudson or North river. There she landed one of the barges, at the foot of Washington street, New York, and another of them at the foot of Hammersly street, and then entered the East river, with several of her fleet, steering and heading for the Atlantic dock, in Brooklyn, where she was to land another of the barges. That in doing so, the steamer ran across the tide, then running a strong ebb, and steered close to the dock, in such a manner that the Owen Gorman was swung and driven with great violence against the schooner (or sloop) Financier. That persons on board of the latter, seeing the steamer swinging in, and that she would be struck by one of her barges, threw out a wooden fender, to ward off the impending collision, which, having been forced from their hands, was forced and crushed into the Owen Gor-

[ \* 67 ] man on her starboard side, just forward of midships, \*cut-

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ting in her planks, and making a hole, through which she was filled with water, and sunk, with her cargo.

It is alleged that the collision was caused by the negligence and want of care or skill of the master and crew of the steamer, and not from any fault of those persons who were on board of the Gorman. It is also alleged that, immediately after the sinking of the Gorman, the owners of the steamer were informed of it, and that a protest, in due form, had been served upon them.

The libelant then states the loss from the collision; that he had, at the request of the agent of the owners of the steamer, employed William J. Babcock, a wrecker, to raise her, the latter having done, upon different occasions, work of that kind for the company. That Babcock contracted to raise and put her afloat for \$450—it being then expressly understood, between the agent and the libelant, that if the hole which had caused the sinking of the barge should be found where the latter expected and said it was, the company were to be responsible for all damages done to the barge, and for the losses sustained from her having been sunk by the collision.

Babcock raised the barge sufficiently to have her taken to Red Hook Point, and there beached her upon the flats, so that the tide rose and fell in her, when it was ascertained that the hole was in the starboard side of the barge, a little forward of midships. Babcock then proceeded, without the knowledge of the libelant, to discharge the coal from the barge, had the same stored in the coal yard of the consignees of it, and then gave notice to the libelant that he had advertised the barge and the coal for sale, to pay his wrecker's lien upon them, which he claimed to have, in virtue of the wrecker's act of the State of New York.

The barge and coal were sold, the first being bought by Henry J. Vroom, for three hundred and fifty dollars; the coal was purchased by the consignees of it, at three dollars per ton. The sale was without the consent of the libelant, and when he was absent from New York. When he heard of the sale he came to New York, to protect his interest, and intending to pay Babcock for raising the barge, as the owners of the \*steamer had re- [ \* 68 ] fused to do so. It was finally arranged by his paying to Babcock \$450, the sum which had been agreed upon; the further sum of \$299.96 for unloading, carting, storing, and shoveling the coal; and the further sum of \$236.12 to the consignees for the deterioration of it, which had been estimated by two referees, each party having chosen one of them.

The libelant then sets out, that the barge was so injured from the force and violence of the collision, and the pressure of the

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steamboat and inner barge, to which she was lashed when it occurred, that it became necessary to take her to the dry dock for repairs. That it was at a time when the barge's services were particularly valuable to him, and that, from her having been sunk, he had sustained damages for her repairs, for the loss of all her fixtures, and for the loss of time, and for the expenses of her master and crew, exceeding two thousand dollars, which the consignees of the New Philadelphia had refused to pay.

The allegations in the libel are direct, positive, leaving nothing to implication, and not exaggerated, either by inapt circumstances or coloring.

We will now place in juxtaposition with it the answer. Those pleadings will disclose the issues between the parties, and enable us to apply the evidence to them successively, or in the order of their affirmation.

The claimants admit that they are and were the owners of the New Philadelphia, when the barge Owen Gorman and ten other boats were taken by her to be towed from Brunswick, New Jersey, to be left at New York and Brooklyn, at different designated points in both; that they were ignorant then, as they are still, who were the owners of the Gorman, or of the number of tons of coal then on board of her. They deny that she was then a tight, strong, and staunch vessel, and charge that she was unfit for the transportation of her load for the passage she was to make. It is then averred, upon information and belief, that the landing of the steamer at the Atlantic dock, in Brooklyn, where the injury to the barge, as is described to have happened, was in this manner:

That the steamer, after having left six barges at their [ \* 69 ] places \* on the North river, proceeded from it into the East river with the other barges in tow, to leave them at their places of destination; that the Gorman was in the first tier of boats on the outside, on the starboard side of the steamer as she approached the Atlantic dock "*from westwardly*," and headed up the East river, when the tide *was about the first of the ebb*; that one of the barges on the steamer's larboard was destined for that dock, and in the act of leaving her there; that the steamer came to with her fleet with her starboard side nearest the dock, and alongside of a sloop lying at the dock, which was a fit and suitable place to leave her, and that the steamer and her fleet were brought to alongside of the sloop with great care and gentleness. It is admitted that a fender had been put out by some person on board of the sloop to fend off the barge; but whether the fender had been forced and crushed into her they were ignorant, and deny. It is admitted

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that the barge sunk at the Washington pier, to which she had been towed by the steamer, within an hour after the collision had occurred at the Atlantic dock.

It is then alleged that the master and crew of the barge had allowed her to sink with her cargo, without making an effort to prevent it, and that notice had not been given to the master of the steamer of the barge's sinking condition, to enable him to make any attempt to do so. The claimants then deny that Babcock had been engaged by their agent to raise the barge, and that he had only recommended Babcock as a fit person to be employed for that purpose; and that if their agent had done otherwise, it was not within the scope of those duties they had engaged him to do; that he could make no contract to bind them for any damage which the barge had sustained from the collusion, or for any expense whatever growing out of her having been sunk from the causes set forth in the libel.

The damages and expenses are charged to have been largely increased by the negligence and inattention of the master of the barge. It is also charged, that she had been towed, under an agreement made with her master; that it was to be done at his and her owner's risk.

\*The issues, then, to which the evidence is to be applied, [ \* 70 ] are substantially the state of the tide when the steamer, in entering the East river, was steered across it to land a barge at the Atlantic dock; next, that the Gorman was not seaworthy for the carriage of her cargo, and that she was not a tight, staunch, and strong vessel. We dismiss these averments in the answer, by observing that the owner of the barge proved very satisfactorily that she had been well built with the best materials; had been thoroughly repaired the year before the collision, in respect to all the wear and tear of her five or six years' service after she was built; and that she was staunch and strong, and particularly water-tight, when she was approaching the Atlantic dock in tow of the steamer. Two witnesses say that they saw her pumps tried one hour before, and that she was dry. Their testimony is conclusive to establish the seaworthiness of the barge in every particular, from the time that she was lashed to the steamer at New Brunswick to be towed to Brooklyn, until after she had been collided with the sloop at the Atlantic dock.

The third issue is, whether or not she had been brought alongside of that vessel with care and gentleness, or with the force and violence of a collision, to cause the injury by which she had been sunk.

The fourth issue arises from the charge in the answer, that there

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had been a want of care in her master, in permitting her to sink with her cargo, after she had been landed at the Washington pier, without any effort to prevent it, and from not having informed the master of the steamer of the injury she had sustained, or that she was sinking, until an hour or more after she had sunk. Here, let it be remarked, that we have the respondents' own appreciation of the time of the delay of which they complain in not having had notice of the injury to the Gorman, and that it was an hour or more after the occurrence. It supersedes the necessity of any further consideration of that charge, particularly as, when the steamer left the barge at the Washington pier, she immediately steamed off to drop another of her fleet at a distant point, without the slightest concern or inquiry of the consequences which the collision had produced.

[ \* 71 ] \*Such are the issues to be considered, and the only correct way of doing it is by a minute citation of the testimony. Kelly, the witness, says he was on board the Gorman at the time of the collision. The barge was on the starboard side of the steamer next to Brooklyn, and she was the outside barge, one other barge being between her and the steamer. The steamer had come from the North river around Governor's island, around Buttermilk channel, and across it to Atlantic dock. The steamer was intending to go up East river, and was attempting to drop a barge at Atlantic dock. That barge was on larboard side of tow, but cannot specify her position. The steamer came in *across, the tide running out a strong ebb*, and, in the effort, the tug swung round and struck the Owen Gorman against the schooner, which was fast at the dock, with weight of the whole tow. Two men on schooner ran and threw a long stick or fender between tug and steamer. The force of the junction pressed the stick out of their hands, and raised it perpendicularly between the two vessels; blow and jar was very severe. Witness saw the stroke; was standing forward of midships' cleet, about three feet from where the fender struck, and as he saw it wrenched out of the men's hands, he started back to get out of the way. The barge was forward of place where witness stood. The tug landed a barge, and then started up East river with the residue of her tow, including the Owen Gorman, to Washington street, a mile or more above, where she was landed nicely. Then found she was lowered in the water. He then went on her, and into her hold, where he found the water up to his knees. She was hauled into dock, and there she sunk in twenty minutes. Found that she was making water as soon as she was cast off from the tug. Afterwards found planks crushed in at place where stick

or fender struck her, about the width of two planks, and two or three feet long; the planks were broken. Nothing occurred between Atlantic dock and place of landing. Supposes the loading of coal prevented the water pressing in sooner. *Tow was swung round at Atlantic dock by the tide.* After landing boats at North river, asked master of the Gorman how she stood the service, and a few moments before collision. He said she was perfectly \*dry, and drew the pump in witnesses's presence, and it [ \* 72 ] sucked perfectly dry. Had unloaded her four times before, and never found any water in her. She was a sound and good boat.

In the cross-interrogation of this witness, he qualifies nothing, adds nothing, and his testimony is not contradicted by any other witness in the case, but is confirmed by several. Daly, the second witness, says the *tide was ebb and strong*; blow was strong; did not feel the shock; saw men putting out fenders from the sloop; cannot describe it particularly; all done quickly; saw the collision standing on the deck of his boat. The tow, coming from North river, swung around and knocked against vessel at dock. Cannot say what caused the tug to swing round; *supposed barge was injured when the blow was given.* Daniel McCauly was in the barge, and in the cabin, when the blow was received; felt it; dishes were knocked out of his hand, and gave him a shock in his seat, but not severe enough to knock him off his seat. Patrick Campbell says, *tide was a strong ebb*; corroborates, in its particulars, the occasion of the collision; says it was the unskillful manner in which the steamer attempted to land the stern-boat on her larboard side; both she and her fleet were brought round in an unskillful and careless manner. Either the steamboat should have headed up the East river sooner than she did, and at a greater distance from the dock, and, in passing up, dropped the barge she intended to land, or else she should have headed for the dock until within a certain distance, and then heaved a line, dropped the barge, and passed on. The barge was struck on her starboard side, about midships, with great force, so as to break the planks on that side, making two holes in the third plank above the bilge plank. After the collision, steamer continued on her way with the barge as far as Washington street. The barge met with no other injury between the time of the collision and her sinking. The facts stated by the witness have been given, with his impression of the cause and consequences of them, when they occurred. John Campbell says the tide was ebb and running strong. The steamboat should have made allowance for the tide, which was running hard, which

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[ \* 73 ] \* was not done. Schweimer says the *tide was ebb and running strong*. William Murtagh says, I met the captain of the steamer, and asked him how he came to sink the Owen Gorman. He said he never landed a boat so nicely. I asked him if he did not swing her against a schooner. He said he was landing one of his boats in tow at the Atlantic dock, and it being a strong ebb tide, his tow swung round, and, the Owen Gorman being the last boat to the "spur" boat, swung in against a schooner lying next to the wharf, and that one of the hands on board of the schooner held a wooden fender down, and it was probable schooner and fender striking between two timbers made a hole in her, and caused her to sink. An unsuccessful attempt was made to weaken the force of Murtagh's testimony, but not to discredit him, by calling as a witness Edward Duffey, who was with him at the time the conversation took place between Murtagh and the captain of the steamer. In Duffey's statement of it, he does not introduce the words, "and it being a strong ebb, his tow was swung." His report of it is, the captain said he had come to Brooklyn to land one of his boats, and the swinging around, and the fact that the Owen Gorman was the boat next the spur boat, on the outside boat of the tow, operated so that when the Owen Gorman struck a schooner lying at the dock, if she had got a hole in her that caused her to sink, it must have been caused by the collision consequent on the tow swinging against the schooner. Duffey was introduced as a witness to relieve Captain Holman from the imputation of having misstated, in his conversation with Murtagh, the time of tide when the collision took place differently from what he said it was in his evidence. But what the captain stated was this: "Went north of Governor's island and across Buttermilk channel, three or four hundred yards below the end of the island, east face, then hauled up *against the ebb tide*, and landed barge. He considered it a good landing. Thinks it was about *slack tide in North river*; ran up the docks two or three hundred yards, and alongside of the vessel, and stopped tug, and then left the wheel, leaving pilot there, to attend to landing a barge from the larboard side; and

[ \* 74 ] after landing her, continued up to Wall street, \* Brooklyn. Returned to the wheel again; did not see the fender put down; it was an easy landing, with a little drift play upon the boat. Stopped engine about two hundred feet from the vessel at the wharf, and headway of tug stopped three or four feet from her, when witness left the wheel; there was no headway at all on tow at the time of collision; headway of tow was a little in towards the vessel, and that caused her to come into collision; it was *that sheer*



*that brought her against the vessel.* Thinks she was a sloop, about thirty feet long, and higher than the barge; never safe to put a wooden fender between vessels; is always liable to cause damage, because these tow-boats are weak, and fenders are apt to break them in." We have been particular in citing Captain Holman's testimony in his own words. Taken in all its connection, it serves to establish, that the cause of the collision was owing to his not having made allowance of distance enough between the barge and the sloop, when he was approaching her, to prevent that sheer which brought the barge into collision with her. He says, "head-way of tow was steered a little in towards, and that caused her to come into collision." His having said that there was no headway at all on tow at the time of collision, does not alter the fact of its occurrence—from his not having properly estimated his boats' inward movement towards the sloop, when he was steering "a little towards her," and so near to her, that the collision was caused by a sheer of the steamer. Sheer, in nautical meaning, is a deviation from the line of the course in which a vessel should be steered, and though it may occur from causes unpreventable by the most skillful seamanship, it more frequently happens from an unsteady helmsman; and the latter was the fact in this instance, probably produced by the person then at the helm not being watchful enough of the state of the tide when advancing to the Atlantic dock to land a barge. We need not cite more of the testimony to establish it to be a fact that, when the collision happened, the tide was running strong ebb, and had its agency in producing the collision.

The attempt to account for the sinking of the barge by her having been injured by iron spikes when she was left at her \* place of destination, is most unsatisfactory. Babcock's [ \* 75 ] testimony in that particular, both as to his suggestions and opinions, is altogether conjectural. There is not even a possibility of its being correct, unless the testimony of every other witness in the case shall be considered mistaken and untrue. Babcock did not mean to say anything untrue; but he started an idea contrary to all the probabilities of the incident of which he was speaking, without a single fact to support it. We have not allowed ourselves to make any comparison or contrast between the witnesses in this case, either as to truthfulness or intelligence, or difference of condition. We do not think that the matters of which they spoke were above their comprehension, because every interrogation was brother-german to the occupation of all of them. They were all boatmen, very much of the same intelligence and character, and were employed by the parties to the suit to do their business, with

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an expectation if, in the navigation of the tug and her fleet, anything should occur leading to litigation, that they would have to resort to them to tell how it had happened. Such considerations should be kept in mind, in our judgments on such cases, and it should not be presumed, either in argument or judgment, that such classes of men have not a sense of truth fully up to their perception of moral obligation in its bearing upon those who do, from necessity, the rough out-door work of life.

We have not been unmindful of the charge in the answer of the respondents, that the master of the barge had been careless in not making some effort to prevent her from sinking, and that the injury to her and to her cargo had been increased by the master and owner's negligence. No testimony of either can be found in the record. As to the damages and expenses accruing from repairs and the deterioration of the cargo, they were properly made the subject of a reference to a master. His report appears to have been done judiciously, and with the accustomed regularity of such a proceeding. The objection that he had excluded a witness, who was offered by the counsel of the respondents, we cannot consider here, because the proper course has not been taken in respect to it.

There should have been a written statement upon oath as [ \*76 ] to the \*particulars which the witness was offered to prove, that the court might have compared it with what had been already proved by the other witnesses of the respondents, to enable the court to determine whether it was independent or only cumulative proof.

As to the other exceptions to the sum reported by the referee, they were fully considered by the circuit judge who tried the appeal. They were rightly passed upon by him, and this court particularly instructs me to say, notwithstanding that the exceptions were properly taken and argued in the circuit court, that the subsequent admission of the report, in the aggregate, by the counsel, even though that was only with the intention to give *this court jurisdiction*, shall not be reduced here by denying it in detail for the purpose of taking it away.

Our conclusions in this case are, that the ebb tide was running strong when the steamer crossed it in going from the North into the East river, and that in making the Atlantic dock allowances were not made for the strength of the tide, so as to reach it with proper care and skill, and that the collision and sinking of the *Owen Gorman* were the results of her having been brought, by the steamer's fault, into collision with the sloop and the fender which was put out to ward off an impending blow, and the heavy pressure

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upon her by the steamer and the loaded barges which she had at that moment in tow. That, putting out the fender for such a purpose was no fault upon the part of the sloop, then lying fast at the dock; and, if there was any fault in doing so from the kind of fender which had been used, the rule of law is, that when a third party has sustained an injury to his property from the co-operating consequences of two causes, though the persons producing them may not be in intentional concert to occasion such a result, the injured person is entitled to compensation for his loss from either one or both of them, according to the circumstances of the incident, and particularly so from the one of the two who had undertaken to convey the property with care and skill to a place of destination, and there shall have been, in doing so, a deficiency in either.

The testimony in the case given by the libelant shows that \*the Owen Gorman was tight, staunch, and strong [ \*77 ] at the time of the collision at the Atlantic dock; that, from the time of its happening and of the sinking of the barge did not exceed one hour, and that she sank in twenty minutes after she had been cast off by the steamer at her place of destination, and that there had been no collision between the barge and anything else while being towed to it by the steamer, nor any at that place, to justify a conclusion that the injury sustained by the barge had been occasioned there or anywhere else than at the Atlantic dock, in Brooklyn, and in the manner as it has been described by the libelant.

Decree of the circuit court affirmed with costs.

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### B. C. CLARK, Appellant, v. HACKETT.

4 BLACK, 77.

#### PRACTICE IN SUPREME COURT—CERTIORARI—RES JUDICATA.

1. Under proper circumstances this court will award a *certiorari* even at the third term after the appeal is filed, but will not permit it to delay the hearing.
2. Where the subject-matter of a suit has been litigated in the courts of the District of Columbia, and the fund remitted to the bankrupt court in New Hampshire for distribution, and the appellant and complainant resumed the litigation there, on the ground that the decree in the first case was obtained by fraud: Held, that the bill was rightfully dismissed, by reason of a total failure to prove its allegations.

APPEAL from the circuit court for the district of New Hampshire.

The appeal was brought here and docketed for December term 1859. Now, in January 1862, *Mr. Black*, for appellant, moved for a *certiorari* on affidavits excusing delay. The court granted the

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writ, but said it should work no delay in the hearing if the case was called before its return. When the case was reached in order, the court directed that the argument proceed.

*Mr. Hackett* appeared for himself.

No counsel for appellant.

[ \* 78 ] \*Mr. Justice NELSON delivered the opinion of the court.

This bill was filed by the complainant, Clark, against Hackett, the defendant, to set aside a decree of the circuit court of the United States for the District of Columbia, and also of this court affirming that decree, on the ground that they were procured by the fraud of the parties, and of the complainant's solicitor and counsel. The suit in the circuit court of the District of Columbia was instituted by Benjamin C. Clark, a judgment creditor of the present complainant, for himself and other creditors, claiming a fund in the hands of the treasury of the United States, which had been awarded to the debtor by the commissioners under the treaty with the republic of Mexico. After the filing of this bill, the present respondent, Hackett, who was the assignee in bankruptcy of the present complainant, filed a bill, praying leave to come in under the creditors' bill, setting up a title to the whole of the fund in question, for the purpose of distribution among the creditors of the bankrupt. The present complainant, the bankrupt, appeared and answered these bills, and afterwards the case was heard on the pleadings and proofs, and a decree rendered by the court in favor of the assignee. The court also directed the fund to be remitted to the district court of the United States for the district of New Hampshire, in which the bankrupt proceedings had taken place, for a distribution among the creditors by that court, as a part of

[ \* 79 ] the \*assets of the bankrupt. An appeal was taken from the decree by the respondent to this court, and which was affirmed, as will appear by the report of the case in 17 How. 315, and the cause remanded to the circuit court. The fund was afterwards, in pursuance of the decree below, remitted to the district court of New Hampshire. While it remained in that court, and before distribution among the creditors, the complainant, the bankrupt, filed the present bill for the purpose of setting aside the decree of the circuit court of this District, and of the supreme court affirming it, on the allegations of fraud committed by the parties, including his own solicitor and counsel, in procuring these decrees, and claiming that he was entitled to the fund, and that payment should be made to him accordingly.

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The court below, after hearing the case on the pleadings and proofs, which were voluminous, held, that the evidence entirely failed to establish the allegations of fraud, and dismissed the bill. It is now here on appeal. The case is a very plain one; and we need only say, that the court, upon the pleadings and proofs, could come to no other conclusion.

Decree of the circuit court affirmed.

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JOHN D. HAGER, Appellant, v. JOHN R. THOMPSON and others.

1 Black, 80.

EQUITY—FRAUD—BURDEN OF PROOF.

1. A stockholder in an incorporated company, being dissatisfied with the management, agrees to sell out his stock at its fair value, to be ascertained by an examination into the affairs of the company, its books, accounts, &c. Held, that under an allegation that he had been imposed upon and defrauded, by concealment and misrepresentation, while making that examination, a court of equity has jurisdiction to grant appropriate relief.
2. But in such an allegation it is incumbent on the plaintiff to establish it by satisfactory proof, especially, when, as in this case, it is shown that he was reasonably well aware of the sources of information, and asked for none which was not furnished to him.
3. The transaction in this case does not stand upon the ground of a settlement between debtor and creditor, which is only *prima facie* evidence of its correctness, but is a case of the consideration paid by purchaser to vendor; and the complainant has wholly failed to show fraud, concealment, or any other matter to impeach the transaction.

APPEAL from the circuit court for the district of New Jersey. The case is very fully stated in the opinion.

*Mr. Runsen*, for appellant.

*Mr. Bradley*, for appellees.

\* Mr. Justice CLIFFORD delivered the opinion of the court. [ \* 85 ]

This was a bill in equity, and the case comes before the court on appeal from a decree of the circuit court of the United States for the district of New Jersey, dismissing the bill of complaint. It was filed on the eighteenth day of May, 1852, and was brought by the appellant.

Some brief reference to the introductory allegations of the bill of complaint, and to the transactions out of which the controversy has arisen, is indispensable, in order that the foundation of the claim made by the complainant may be fully understood.

It appears that the New Brunswick Steamboat and Canal Trans-

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portation Company, usually called the New Brunswick Company, was incorporated on the eighteenth day of January, [ \* 86 ] \* 1831, and that the charter expired, by its own limitation, on the eighteenth day of January, 1852. Shortly after the charter was granted the company was duly organized, with a capital of twenty-five thousand dollars. Seven and two-thirds shares of the stock were taken by the appellant, and he was elected secretary of the company. They purchased a steamboat in 1831, which was employed in the transportation business between New Brunswick and the city of New York; and they also purchased a sloop, which was employed in carrying wood for the steamboat, and was also engaged in the transportation of merchandise on the Raritan river.

Two other companies were also created by the legislature of the State of New Jersey, and authorized to engage in the transportation business. One was called the Delaware and Raritan Canal Company, incorporated in 1830, and the other the Camden and Amboy Railroad Company, incorporated contemporaneously with the New Brunswick Company. Those companies were united in 1831, and were subsequently known as the joint companies. Most or all of the respondents were largely interested in those companies, and in 1834 they purchased about four-fifths of the stock of the New Brunswick Company; but the complainant still retained his shares and his position as secretary of the company and clerk on the steamboat. Whatever might have been the object of the purchasers, it is evident that the transfer of the shares had the effect to impart new energy and efficiency to the management of the company, for they increased the capital stock to fifty thousand dollars, making the par value of the shares two hundred and fifty dollars; and, during the early part of the year 1835, made an arrangement with the joint companies for transporting freight through the canal and over the railroad between New York and Philadelphia, and other intermediate places on the route. Under this arrangement they also built and procured canal boats and barges, and ran them on the Delaware and Raritan rivers and through Staten Island sound to the city of New York, operating them by means of steam-tugs furnished by the joint companies. They also did a large business on the Camben and Amboy railroad, using the locomotives, [ \* 87 ] cars, and \*steamboats of the railroad company for that purpose. Throughout this period they also continued to operate their steamboat line between New Brunswick and New York; and in 1837 they engaged in the coal business, purchasing and transporting coal to market, as is more fully set forth in the

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pleadings. Large profits were made by the company under these various arrangements; but they also incurred very large expenses, and the complainant became dissatisfied with the management of the company. Failing to get any redress for his supposed grievances, he, on the twenty-fifth day of March, 1847, filed a bill in equity in the chancery court of the State against three of the present respondents, charging them, as directors of the company, with divers frauds and breaches of trust in the management of its affairs, and praying for an account of all the business of the company. To that bill of complaint the respondents in the suit made answer, denying the charges, and exhibiting what they alleged to be the actual circumstances of the case. Pending that suit, the complainant, with two other persons, purchased four additional shares of the stock of the company, and the same were held in the name of one of those persons for the equal benefit of the purchasers at the time the suit was brought.

With these explanations as to the origin of this controversy, we will proceed to state the foundation of the claim made by the complainant. Among other things, he alleged, that after he had proceeded to take testimony in that suit in support of his bill of complaint, propositions of compromise were made in behalf of the defendants, and that the propositions so made were entertained by him in the spirit of conciliation. Those propositions of compromise, he alleged, were made to him through R. F. Stockton, one of the respondents in this suit, who was the agent of the company and of these respondents; and he also alleged, that it was agreed and arranged that the suit should be compromised and settled in the manner and upon the basis set forth in the present bill of complaint. Both parties agree that the suit was settled in consequence of that arrangement, and that the stock of the complainant, including the four shares purchased during the pendency of that suit, was \* transferred to the company; but they [ \* 88 ] differ, in some respects, as to the terms of the agreement providing for the transfer, and still more widely as to the circumstances under which the transfer was made.

As alleged in the bill of complaint, R. F. Stockton applied to the complainant, about the second day of September, 1847, to ascertain whether there could not be an amicable settlement of the matters involved in that suit, and that the conference resulted in an agreement that the company and the defendants in that suit should purchase his stock in the company, and pay him therefor such price or sum as, upon a fair examination of the affairs of the company, and a proper and fair estimate of the money, property,

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and assets of the company, the stock should be found to be worth. Having set forth the supposed agreement, the complainant proceeded to allege that he and R. F. Stockton, accordingly, met at Princeton, on the thirteenth day of January, 1848, to carry out and complete the same, for the sale and purchase of the stock; that from a partial examination of the books kept by the treasurer, and from assurances there given by R. F. Stockton and others that a certain abstract account there exhibited, and which was taken from the books, was correct, and contained a fair statement of the business of the company, and of the moneys received and of the disbursements made, and not knowing that there were other books of the company not produced at the time the abstract was prepared, he was induced to believe that the account was true and correct, and consequently did, upon the payment of his proportionate part of two hundred and eighty-nine thousand dollars, transfer the stock owned by him, including the four shares purchased during the pendency of the suit, to the company, and received pay for the same from the company's funds. But he alleged that he had since discovered that the abstract account was false and fraudulent in very many particulars, as specified in the bill of complaint; and, therefore, insists that he is entitled to have the settlement corrected and reformed, and to have an account taken of the entire property and estate of the company, and to be paid such additional sum for his stock as the same, upon such accounting, be found [ \* 89 ] \* to have been worth. On the other hand, the respondents, in their answer, admitted that they, by virtue of their being the last president and directors of the company, became and were the trustees of the corporation, with full power to settle the affairs, collect the outstanding debts, and divide the moneys and other property of the company among the stockholders, after paying the debts due and owing from the corporation; but they allege that the agreement was, that the complainant should sell the stock, held and represented by him, at such price as the same should be found to be worth, upon a fair valuation, of the property of the company, and that the complainant, if he desired it, should have an opportunity of examining the company's books to satisfy himself of their correctness. Substantially adopting the language of the bill of complaint, they admitted that the complainant and R. F. Stockton met at Princeton, on the thirteenth day of January, 1848, to make a valuation of the property, and carry out the agreement; but aver that the counsel of the complainant and the defendants in that suit were present, as well as several other directors, and the treasurer and clerk of the company. According to the



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answer, all those persons, with others connected with the company, were present to aid and assist in making the valuation and statement of the property, and in such examination of the books of the company as the complainant or his counsel might desire to make. In this connection, they also allege that the books of the company were produced at the meeting and were examined by the complainant and his counsel as fully and for such length of time as they desired; and that all such explanations of the same as the complainant or his counsel required were fully and freely given by the persons present, who were the persons best qualified to make such explanations. It was at that meeting that the valuation was made; and the respondents alleged that all of the property of the company, according to the best of their judgment, information, and belief, was fairly and liberally appraised, and to the satisfaction of the complainant; and they also alleged, that he finally agreed that the settlement should be made on the basis that the books were correct as they stood on the \*second day of April, [ \* 90 ] 1847, when the abstract exhibit was made out, without taking into the account any subsequent transactions. One matter only, and that not now in dispute, was left in doubt, and provision was made for its satisfactory adjustment. Assuming the abstract to be correct, it showed a balance in favor of the company of forty-two thousand one hundred and fifty-six dollars and sixty cents. That sum, added to the appraised value of the property, ought to have been taken, as the respondents alleged, as the true value of the capital stock of the company; but they alleged that, at the suggestion of the complainant, and by mistake on their part, the sum of fifty thousand dollars, being the whole amount of the original capital, was added to that amount as the basis of the settlement, making the sum of two hundred and eighty-nine thousand dollars, as alleged in the bill of complaint. Pursuant to that settlement, the company paid to the complainant one thousand four hundred and forty-five dollars for each share, paying therefor, as they alleged, two hundred and fifty dollars on each share more than they ought to have paid according to the terms of the agreement; and they denied that there was any fraud or deception practiced by them or their agents in any part of the transaction. Some eighteen witnesses were examined by the complainant in support of the allegations of the bill of complaint, but the respondents took no testimony; and, after a full hearing in the circuit court, a decree was entered dismissing the bill of complaint. 1. It is contended by the complainant, that the agreement obligated the respondents to pay him such price for the stock he transferred to them as, upon

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a fair examination of the affairs of the company, and a proper and fair estimate of the moneys, property, and assets of the same, the stock was found to be worth; and if the examination of the books at Princeton was not a fair examination of the affairs of the company, and the estimate there made of the moneys, property, and assets of the company was not a proper and fair estimate of the same, and in consequence thereof he was induced to accept a less price than the agreement authorized him to expect and demand, then he is entitled to have an examination of the books and [ \* 91 ] \* the accounts, and to be paid such additional sum for his stock as it may be found to have been worth upon such restatement. Suppose the proposition to be correct as a general rule of law, still it remains to be ascertained whether the theory of fact on which it is based is sustained by the evidence. Undoubtedly, if there was any fraud or deception practiced upon the complainant, as alleged in the bill of complaint, to induce him to transfer his stock for a less price than he was entitled to receive upon the reasonable fulfillment of the condition of sale to which he had agreed, and in consequence of such fraudulent acts or misrepresentations, he actually parted with the stock at less than its value on the basis of the agreement, then clearly he would be entitled to relief; but the burden of proving the charge of fraud is upon the complainant. Fraud cannot be presumed or inferred without proof in a court of equity, any more than in a court of law; and in both the rule is, that he who makes the charge must prove it; and there are some circumstances in this case, besides the fact that the charge is denied in the answer, that render the application of that rule peculiarly proper. As appears by the complainant's own showing in the present bill of complaint, he became dissatisfied with the manner in which the affairs of the company were conducted as early as the twenty-fifth day of March, 1847; and he accordingly alleges, that on that day he filed his bill in the chancery court of the State of New Jersey against three of the present respondents, charging them, as directors of the company, with divers frauds and breaches of trust in the management of its affairs. Answer was made to that suit by the respondents, and the complainant continued to prosecute it until the thirteenth day of January, 1848, when the settlement took place, and he transferred his stock. Most of the substantial matters now in controversy were more or less involved in that litigation; and, during the pendency of the suit, both the complainant and his counsel, on two or more occasions, were allowed to inspect the books of the company, and his own testimony shows that they examined them as fully and for such length of time

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as they desired. On one occasion the treasurer and book-keeper appeared before the master in \*chancery, and, in [ \* 92 ] obedience to a subpoena *duces tecum*, produced the books; and they were examined for several days. His own testimony also shows that he was present at the meeting of the stockholders on the third day of April, 1847, when the abstract in question was made; and several of his witnesses testify that the books were produced and submitted to the examination of the stockholders. No suggestion was made that any other books or vouchers, not produced, were necessary to a full exhibition and understanding of the affairs of the company; and none of the circumstances elicited on the various occasions, when the books were produced, afford any countenance whatever to the theory that any concealment, deception, or evasion was practiced by the respondents. On the contrary, they furnish indubitable evidence that the complainant had every reasonable facility, and the most ample means, to ascertain the true state of the accounts. Whatever means of information the respondents had upon the subject appears to have been laid before the complainant, and surely he had no right to ask for more; and he is equally unfortunate, if the testimony adduced by him, as to what occurred at Princeton on the thirteenth day of January, 1848, be compared with the allegations of his bill of complaint. It was at that meeting, it will be remembered, that he accepted the propositions of compromise, and transferred his stock, and the witnesses substantially agree that the allegations of the answer are correct; that his counsel was present, and that he examined the books to his satisfaction, without even suggesting that any others were desired. Complaint is now made that the books of the agents in New York and Philadelphia were not produced on that occasion; but his own witnesses testify that he called for no others at the time; expressed himself as satisfied with the examination; and the bill of complaint admits that he agreed to the settlement, accepted the estimated price of his stock, and transferred it to the company.

Looking at the whole evidence, therefore, it is obvious that the charge of fraud and deception is wholly unsustained by proof, and we think the allegations of mistake, so far as the complainant is concerned, are equally unfounded. But it is \* fully [ \* 93 ] proved that a mistake in his favor was made in the basis of the settlement to the amount of fifty thousand dollars. That mistake, as appears by the evidence, was made by adding the capital stock to the estimated amount of all the moneys, property, and assets of the company, when, in point of fact, the whole of the cap-

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ital stock had been expended in purchasing the property already included in the valuation. Before the consideration was paid for the stock the mistake was discovered, and the complainant was requested to consent to the correction by a corresponding reduction from the basis of the settlement, but he replied that it was too late to correct errors. That refusal is a circumstance of some significance, plainly indicating that the complainant did not then think it for his interest to rescind the contract, or that he had been circumvented by the respondents. He who seeks equity should do equity, is a maxim in equity jurisprudence, and we think that rule has some application to this case. 2. Numerous mistakes in the basis of the settlement are alleged in the bill of complaint, and some eighteen in number were urged upon the attention of the court at the argument by the counsel of the complainant. It was held by this court in a case between creditor and debtor that a settled account is only *prima facie* evidence of its correctness; that it may be impeached by proof of unfairness, or mistake in law or fact; and, if it be confined to particular items of account, it concludes nothing in relation to other items not stated in it. (*Perkins v. Hart*, 11 Whea. 256.) Granting the correctness of that principle as applied to the case then before the court, still it is obvious that it cannot have any very direct application to the case under consideration. Much the largest number of controversies between business men are ultimately settled by the parties themselves; and when there is no unfairness, and all the facts are equally known to both sides, an adjustment by them is final and conclusive. Oftentimes a party may be willing to yield something for the sake of a settlement; and if he does so with a full knowledge of the circumstances, he cannot affirm the settlement, and afterwards maintain a suit for that which he voluntarily surrendered. But the [ \* 94 ] present case is one between \* vendor and vendee, and the rights of the parties must be measured by the terms of the agreement under which the sale and purchase were made. Assuming that the agreement was as is alleged in the bill of complaint, all the complainant could claim was such a price for his stock as, upon a fair examination of the affairs of the company and a proper and fair estimate of its moneys, property, and assets, the stock should be found to be worth. That examination into the affairs of the company was made by the parties to their satisfaction, and they also made the estimate; and there is no evidence of any unfairness, or that they committed any error, except the one already mentioned in favor of the complainant. On this point the complainant called and examined the agents of the railroad line,

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and the agents of the canal lines, and the agents of the coal barge lines, and they all testified, in substance and effect, that the accounts, or the results of the business, as ascertained by the monthly settlements, were correctly entered on the company's books. All of the accounts of the steamboat line were kept by the treasurer, and it has already appeared that those books were exhibited to the complainant at the time of his settlement. Nothing need be remarked respecting the steam-towing business, except to say that the matter was fully settled between the two companies in 1846, and the result of the settlement was duly entered on the books of the company. Without entering more into detail, suffice it to say that the gravamen of the bill of complaint is, that the complainant was induced to sell his stock for less than its worth; but he has not introduced one word of truth to sustain the allegation, and his own testimony shows that by mistake he received two hundred and fifty dollars on each share more than he was entitled to according to the agreement. In view of the whole case, we are of the opinion that the complainant has wholly failed to support the allegations of the bill of complaint, and the decree of the circuit court is accordingly affirmed, with costs.

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HECKER, Plaintiff in Error, v. FOWLER.

1 Black, 95.

## PRACTICE IN SUPREME COURT.

1. It is no sufficient ground to dismiss a writ of error, on motion in this court, that there is no error apparent on the record.
2. To attempt to ascertain this on motion is to decide the merits of the case before it is reached in its regular order on the docket.

THIS is a writ of error to the circuit court for the southern district of New York.

*Mr. Andrews* moved to dismiss, and affirm the judgment.

*Mr. Monroe*, for plaintiff in error, resisted the motion.

Mr. Chief Justice TANEY delivered the opinion of the court.

We are asked to dismiss this writ because no error appears on the face of the record. It is not necessary, by the practice of this court, for the party who brings a cause here to specify upon the record the errors he complains of, and they are not even informally brought to our notice until the argument is heard. Want of jurisdiction and irregularity of the writ are the only grounds for dismissal. Where a judgment appears to have been rendered which the party

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Dermott v. Wallach.

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is entitled to have revised in this court, and it is also seen that it comes here for such revision upon proper process, duly issued, all other questions must await the final hearing. To say that [ \* 96 ] there is no error in this judgment, and affirm it \* for that reason, would be to decide the whole legal merits of the case, and this we cannot do on a motion to dismiss or quash the writ.

Motion denied.

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ANN R. DERMOTT, Plaintiff in Error, v. C. S. WALLACH.

1 Black, 96.

REPLEVIN—PLEADING—PRACTICE IN CIRCUIT COURT.

1. To an action of replevin, a plea that the goods and chattels replevied are not the property of the plaintiff, is good in bar of the action.
2. It is error to go to trial and take a verdict that there was no rent in arrear, and render judgment thereon, paying no attention to the plea of no property in plaintiff.
3. In such case the judgment must be reversed as a mistrial, and a new trial ordered.

WRIT of error to the circuit court for the District of Columbia. The case is stated in the opinion.

*Mr. Brent*, for plaintiff.

*Mr. Carlisle* and *Mr. Coxe*, for defendant.

[ \* 97 ]      \* Mr. Justice NELSON delivered the opinion of the court.

This action was replevin, brought by the plaintiff below, Wallach, against the defendant, for taking certain goods and chattels of the plaintiff from a house called the Avenue House, situated in the city of Washington.

The defendant pleaded: 1. That the goods and chattels in the declaration mentioned were not the property of the plaintiff. 2. Avowed the taking, by way of distress, for rent due and in arrear, under special circumstances stated, concluding with a verification. 3. Like avowal for rent due and in arrear generally.

The plaintiff replied to the first avowry, no rent in arrear and unpaid. No notice is taken in the pleadings of the second avowry.

The jury found a special verdict, that no rent was due or in arrear upon the issue joined on the first avowry, and assessed the damages; and judgment was given that the plaintiff recover the goods and chattels, and have a return of the same, &c. No notice is taken in the verdict or judgment of the plea of property.

The plea of property in replevin is a good plea in bar of the action. It is true, the plea in this case is not in due form, and might

O'Brien v. Smith.

have been held defective on demurrer; but is good in substance. The form is to plead property in the defendant, or in a stranger, traversing property in the plaintiff, which traverse raises the material issue to be tried—the averment of property in the defendant or a stranger being by way of inducement. Either plea constitutes a good defense, because it \* shows property out [ \* 98 ] of the plaintiff; and *prima facie*, therefore, he is not in condition to maintain the action. 12 Wend. R. 30, 34, 35.

The plea in this case avers the fact directly, by stating that the goods and chattels in the declaration mentioned are not the property of the said plaintiff. Under this plea, it was competent for the defendant to have proved property in herself, or in a stranger, as this would have tended directly to support the issue; and if the defendant had sustained her plea, and proved property out of the plaintiff, she would have been entitled to a return of the goods and chattels without an avowry, as it would appear the plaintiff, at the time, had no right to take or detain them.

As this plea of property is a good bar to the action, and as the record shows it has not been tried or found by the jury, there has been a mistrial below, for which the judgment must be reversed, and the case sent down, and a new venire ordered. There is a good bar to the action remaining untried, and not yet found for the plaintiff, and hence he is not entitled to the judgment rendered in his behalf in the court below.

It appears that the similiter was not added to the plea of property; but this is now regarded as matter of form, and its omission does not affect its validity.

The omission to join issue upon the second avowry, or to notice it in the finding of jury or in the judgment of the court, is cured after verdict.

There is, also, a second plea by the plaintiff to the first avowry, which issue has not been noticed in the verdict, or on the record; but, as the finding of the first issue rendered the second immaterial, the omission, in this respect, is not important.

Judgment reversed and *venire facias de novo* ordered.

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JAMES O'BRIEN, Plaintiff in Error, v. SMITH.

1 BLACK, 99.

BANKS AND BANKING—CHECK—TIME OF PRESENTATION.

1. There is no want of diligence in presenting a bank check for payment on Monday morning drawn on the previous Saturday, though the drawee failed between Saturday and Monday, and holder's place of business was but eighty feet from the bank of drawee.

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Stiles v. Davis and Barton.

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2. The holder and payee of the check being the cashier of an unincorporated banking partnership, for whose use he received it, can maintain the suit in his own name.

WRIT of error to the circuit court for the District of Columbia. The facts of the case are stated in the syllabus above.

*Mr. Davidge and Mr. Ingle*, for plaintiff.

*Mr. Carlisle*, for defendant.

[ \* 100 ] \*Mr. Chief Justice TANEY delivered the opinion of the court.

We think the decision of the circuit court was right upon both of the points raised in the argument. The authorities referred to by the counsel for the defendant in error are conclusive, and it cannot be necessary to discuss here questions which we consider as too well settled to be now open to serious controversy.

Judgment of the circuit court affirmed.

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EDMUND G. STILES, Plaintiff in Error, v. DAVIS AND BARTON.

1 BLACK, 101.

COMMON CARRIERS—LIABILITY WHERE GOODS ARE ATTACHED IN THEIR HANDS.

1. A bailee of goods, as a common carrier, is not guilty of conversion in refusing to deliver the goods to the owner, where they have been attached in his hands by legal process as the goods of another person.
2. The service of such process on the bailee is a good reason for his refusal to deliver the goods according to his contract of transportation.
3. The remedy of the owner in such case is by an action against the sheriff, or the plaintiff in the attachment suit, if he had directed the sheriff in making the seizure of the goods.

WRIT of error to the district court for the northern district of Illinois. The case is stated in the opinion.

*Mr. Dewey*, for plaintiff.

*Mr. Burnett*, for defendants.

[ \* 105 ] \*Mr. Justice NELSON delivered the opinion of the court.

The case was this: The plaintiffs below, Davis and Barton, had purchased the remnants of a store of dry goods of the assignee of a firm at Janesville, Wisconsin, who had failed, and made an assignment for the benefit of their creditors. The goods were packed in boxes, and delivered to the agents of the Union



Despatch Company to be conveyed by railroad to Ilion, Herkimer county, New York.

On the arrival of the goods in Chicago, on their way to the place of destination, they were seized by the sheriff, under an attachment issued in behalf of the creditors of the insolvent firm at Janesville, as the property of that firm, and the defendant, one of the proprietors and agent of the Union Despatch Company at Chicago, was summoned as garnishee. The goods were held by the sheriff, under the attachment, until judgment and execution, when they were sold. They were attached, and the defendant summoned on the third of November, 1857; and some days afterwards, and before the commencement of this suit, which was on the sixteenth of the month, the plaintiffs made a demand on the defendant for their goods, which was refused, on the ground he had been summoned as garnishee in the attachment suit.

The court below charged the jury, that any proceedings in the State court to which the plaintiffs were not parties, and of \* which they had no notice, did not bind them or their [\* 106] property; and further, that the fact of the goods being garnished, as the property of third persons, of itself, under the circumstances of the case, constituted no bar to the action; but said the jury might weigh that fact in determining whether or not there was a conversion.

We think the court below erred. After the seizure of the goods by the sheriff, under the attachment, they were in the custody of the law, and the defendant could not comply with the demand of the plaintiffs without a breach of it, even admitting the goods to have been, at the time, in his actual possession. The case, however, shows that they were in the possession of the sheriff's officer or agent, and continued there until disposed of under the judgment upon the attachment. It is true, that these goods had been delivered to the defendant, as carriers, by the plaintiffs, to be conveyed for them to the place of destination, and were seized under an attachment against third persons; but this circumstance did not impair the legal effect of the seizure or custody of the goods under it, so as to justify the defendant in taking them out the hands of the sheriff. The right of the sheriff to hold them was a question of law, to be determined by the proper legal proceedings, and not at the will of the defendant, nor that of the plaintiffs. The law on this subject is well settled, as may be seen on a reference to the cases collected in sections 453, 290, 350, of Drake on Attachment, 2d edition.

This precise question was determined in *Verrall v. Robinson*

## In re Certain Bags of Linseed.

(Turwhitt's Exch. R. 1069; 4 Dowling, 242, S. C.) There the plaintiff was a coach proprietor, and the defendant the owner of a carriage depository in the city of London. One Banks hired a chaise from the plaintiff, and afterwards left it at the defendant's depository. While it remained there, it was attached in an action against Banks; and, on that ground, the defendant refused to deliver it up to the plaintiff on demand, although he admitted it to be his property.

Lord Abinger, C. B., observed, that the defendant's refusal to deliver the chaise to the plaintiff was grounded on its being on his premises, in the custody of the law. That this was no [ \* 107 ] \* evidence of a wrongful conversion to his own use. After it was attached as Banks's property, it was not in the custody of the defendant, in such a manner as to permit him to deliver it up at all. And Alderson, B., observed: Had the defendant delivered it, as requested, he would have been guilty of a breach of law.

The plaintiffs have mistaken their remedy. They should have brought their action against the officer who seized the goods, or against the plaintiffs in the attachment suit, if the seizure was made under their direction. As to these parties, the process being against third persons, it would have furnished no justification, if the plaintiff could have maintained a title and right to possession in themselves.

Judgment of the court below reversed, and *venire de novo*, &c.

## IN RE CERTAIN BAGS OF LINSEED.

PAUL SEARS and others, Appellants, v. WILLS.

1 BLACK, 108.

## ADMIRALTY—LIEN FOR FREIGHT.

1. The maritime lien on goods carried for the freight is, like the lien of the common carrier on land, only the right to hold the goods until the freight is paid, and is inseparately connected with and dependent upon possession by the carrier.
2. So long as he has this possession he may enforce the lien by a proceeding *in rem* in an admiralty court; but this right is lost by parting with the possession. This is a general rule as to maritime liens in this country, whatever may be the doctrine in European countries, where the civil law prevails. *Rae v. Cutler*, 7 How. 729, (17 Curtis, 374;) *Dupont de Nemours v. Vance*, 19 How. 171, (1 Miller, 624.)
3. But as the course of business in delivery for many reasons makes it expedient and desirable that the goods should be landed, examined, and even placed in a warehouse of consignee before the freight is paid for, the court will, when there is a custom or an express understanding, verbal or otherwise, that the lien is to be retained,

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Sears v. Wills.

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hold that such a transaction is not an absolute delivery, but a deposit for the time, and hold that the ship-owner is still constructively in possession, so far as to preserve his lien.

4. But where, as in the present case, the consignee was party to the charter-party by which such an agreement as to delivery was made, and there was nothing in the transaction by which the goods were delivered absolutely which tended to preserve the lien, they were not liable in a proceeding *in rem* to enforce it.

APPEAL from the circuit court for the district of Massachusetts.

The case is that libelants, who were owners of the ship *Bold Hunter*, provided, in a charter-party between them and Tuckerman, Townshend & Co., for a lien on goods for freight maturing five and ten days after discharge. But the goods on which this lien is claimed were not those of Tuckerman & Co., but goods of Wills, claimant, who was no party to the charter-party, and who received the usual bill of lading. The goods were delivered to him without any reservation of the lien by express agreement; and no custom or usage for such reservation or delay were shown in the case.

The libel of the ship owners was dismissed in the district court, and that decree affirmed on appeal in the circuit court.

*Mr. C. G. Loring*, for appellants.

*Mr. Bates*, *Mr. Story*, and *Mr. May*, for appellee.

\*Mr. Chief Justice TANEY delivered the opinion of the [\*112] court.

The rights of the parties in this case depend altogether on the contract created by the bill of lading. That instrument does not refer to the charter-party, nor can the charter-party influence in any degree the decision of the question before us. Augustine Wills was not a party to it, and it is not material to inquire whether he did or did not know of its existence and contents; for there is nothing in it to prevent Wills & Co., the sub-charterers, or Augustine Wills, the consignee, from entering into the separate and distinct contract stated in the bill of lading, and the assignees took the rights of Wills & Co. in this contract, and nothing more. The circumstance that it came to hands of the ship-owners by assignment from the sub-charterers, who knew and were bound by all the stipulations of the charter-party, cannot alter the construction of the bill of lading, nor affect the rights or obligations of Augustine Wills.

Undoubtedly the ship-owner has a right to retain the goods until the freight is paid, and has, therefore, a lien upon them for the amount; and, as contracts of affreightment are regarded by the courts of the United States as maritime contracts, over which the courts of admiralty have jurisdiction, the ship-owner may enforce

## In re Certain Bags of Linseed.

his lien by a proceeding *in rem* in the proper court. But this lien is not in the nature of a hypothecation, which will remain a charge upon the goods after the ship-owner has parted from the possession, but is analogous to the lien given by the common law to the carrier on land, who is not bound to deliver them to the party [ \* 113 ] until his fare is paid; \*and if he delivers them, the incumbrances of the lien do not follow them in the hands of the owner or consignee. It is nothing more than the right to withhold the goods, and is inseparably associated with his possession, and dependent upon it.

The lien of the carrier by water for his freight, under the ordinary bill of lading, although it is maritime, yet it stands upon the same ground with the carrier by land, and arises from his right to retain the possession until the freight is paid, and is lost by an unconditional delivery to the consignee. It is suggested in the argument for the appellant, that, as a general rule, maritime liens do not depend on possession of the thing upon which the lien exists; but this proposition cannot be maintained in the courts of admiralty of the United States. And, whatever may be the doctrine in the courts on the continent of Europe, where the civil law is established, it has been decided in this court that the maritime lien for a general average in a case of jettison, and the lien for freight, depend upon the possession of the goods, and arise from the right to retain them until the amount of the lien is paid. *Rae v. Cutler*, (7 How. 729;) *Dupont de Nemours & Co. v. Vance and others*, (19 How. 171.)

In the last mentioned case, the court, speaking of the lien for general average, and referring to the decision of *Rae v. Cutler* on that point, said: "This admits the existence of a lien arising out of the admiralty law, but puts it on the same footing as a maritime lien on cargo for the price of its transportation, which, as is well known, is waived by an authorized delivery without insisting on payment."

After these two decisions, both of which were made upon much deliberation, the law upon this subject must be regarded as settled in the courts of the United States, and it is unnecessary to examine the various authorities which have been cited in the argument. But it may be proper to say, that while this court has never regarded its admiralty authority as restricted to the subjects over which the English courts of admiralty exercised jurisdiction at the time our constitution was adopted, yet it has never claimed [ \* 114 ] the full extent of admiralty \* power which belongs to the courts organized under, and governed altogether by, the principles of the civil law.

But courts of admiralty, when carrying into execution maritime contracts and liens, are not governed by the strict and technical rules of the common law, and deal with them upon equitable principles, and with reference to the usages and necessities of trade. And it often happens that the necessities and usages of trade require that the cargo should pass into the hands of the consignee before he pays the freight. It is the interest of the ship-owner that his vessel should discharge her cargo as speedily as possible after her arrival at the port of delivery. And it would be a serious sacrifice of his interests if the ship was compelled, in order to preserve the lien, to remain day after day with her cargo on board, waiting until the consignee found it convenient to pay the freight, or until the lien could be enforced in a court of admiralty. The consignee, too, in many instances, might desire to see the cargo unladen before he paid the freight, in order to ascertain whether all of the goods mentioned in the bill of lading were on board, and not damaged by the fault of the ship. It is his duty, and not that of the ship-owner, to provide a suitable and safe place on shore in which they may be stored; and several days are often consumed in unloading and storing the cargo of a large merchant vessel. And if the cargo cannot be unladen and placed in the warehouse of the consignee, without waiving the lien, it would seriously embarrass the ordinary operations and convenience of commerce, both as to the ship-owner and the merchant.

It is true, that such a delivery, without any condition of qualification annexed, would be a waiver of the lien; because, as we have already said, the lien is but an incident to the possession, with the right to retain. But in cases of the kind above mentioned it is frequently, perhaps more usually, understood between the parties, that transferring the goods from the ship to the warehouse shall not be regarded as a waiver of the lien, and that the ship-owner reserves the right to proceed *in rem* to enforce it, if the freight is not paid. And it appears by the evidence that such an understanding did exist between \*the parties, before or at [\* 115] the time the cargo was placed in the hands of the consignee, or if such an understanding is plainly to be inferred from the established local usage of the port, a court of admiralty will regard the transaction as a deposit of the goods, for the time, in the warehouse, and not as an absolute delivery; and, on that ground, will consider the ship-owner as still constructively in possession, so far as to preserve his lien and his remedy *in rem*.

But in the case before us, there is nothing from which such an inference can be drawn. The goods were delivered, it is admitted,

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Hogg v. Ruffner.

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generally, and without any condition or qualification. Upon such a delivery there could be neither actual nor constructive possession remaining in the ship-owner; and, consequently, there could be no right of retainer to support his lien.

The decree of the circuit court, dismissing the libel, must therefore be affirmed.

Decreed affirmed.

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N. B. HOGG, Appellant, v. BENJAMIN RUFFNER and others.

BENJAMIN RUFFNER and others, Appellants, v. N. B. HOGG.

1 Black, 115.

USURY—WHAT IS, AND WHAT IS NOT.

1. To constitute usury, there must either be a loan and a taking of usurious interest, or the taking of more than legal interest, for the forbearance of a debt or sum of money due.
2. The sale of land or other property on long credit, at a price increased by reason of the credit much more than the lawful rate of interest, is not a usurious transaction.
3. Nor does it make it usury because the land was sold and bought as a means of settling existing indebtedness between the parties, about which there was difficulty, at a price much larger than that at which the vendor agreed to sell it for cash.

THESE are cross appeals from the decree of the circuit court for the district of Indiana. The case is sufficiently stated in the opinion.

*Mr. H. H. Hunter*, for complainant.

*Mr. Stanton* and *Mr. Phillips*, for defendants.

[ \* 118 ] \*Mr. Justice GRIER delivered the opinion of the court.

If the exception taken to the decree of the court below by the complainant be sustained, it will be unnecessary to notice those taken by the respondents.

Was the contract of Brice and Birkey with Ruffner, which shows the consideration of the mortgage and notes assigned to the complainants, usurious?

The statute of Indiana declares, that "the rate of interest upon the loan or for the forbearance of any money, &c., shall be at the rate of six" per cent.; but "if a greater rate of interest shall be contracted for, received, or reserved, the contract shall not, therefore, be void;" "the plaintiff shall recover only his principal, without interest," and the "defendant shall recover costs."

To constitute usury, there must either be a loan and a taking of usurious interest, or the taking of more than legal interest for the forbearance of a debt or sum of money due. This statute does not

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profess to enlarge the common-law definition of the term, while it aims to include the common devices resorted to by usurers to evade its penalties.

The original contract by which a debt is created may be for the purchase and sale of land, and it will be, nevertheless, contrary to the statute for the vendor to demand or receive more than legal interest for the forbearance of such debt, as in the case of *Crawford v. Johnson*, (11 Indiana Reports, 258,) where separate notes were taken for two per cent. interest, in addition to the legal interest on the sum due for the purchase money of land.

But it is manifest that if A propose to sell to B a tract of land for \$10,000 in cash, or for \$20,000 payable in ten annual \* installments, and if B prefers to pay the larger sum to [ \* 119 ] gain time, the contract cannot be called usurious. A vendor may prefer \$100 in hand to double the sum in expectancy, and a purchaser may prefer the greater price with the longer credit; and one who will not distinguish between things that differ, may say, with apparent truth, that B pays a hundred per cent. for forbearance, and may assert that such a contract is usurious; but whatever truth there may be in the premises, the conclusion is manifestly erroneous. Such a contract has none of the characteristics of usury; it is not for the loan of money, or forbearance of a debt.

Does this case come within this category? We are of opinion that it does.

The mortgage and notes in question were given in execution of a contract between the parties, dated the 20th of April, 1855. This contract is in writing, and signed by the parties. It would be tedious and unprofitable to enumerate its various covenants; but the chief subject of it is a sale of land by Brice and Birkey to Ruffner for the sum of \$38,000, in ten annual installments, the sale to include, also, certain personal property. There is no proof that the recitals of this contract are untrue, or that the consideration of the notes and mortgage in question was other than is there stated. These parties had formed a partnership in February, 1854, "for dealing in land, farming," &c., &c. Brice and Birkey advanced money, and had each an interest of one-third in the lands whose title was in the name of Ruffner. In October of the same year this partnership was dissolved, and Ruffner afterwards agreed to pay certain sums of money to the other parties for a release of their interest in the land, and gave them his obligations. Afterwards, in February, 1855, in order to extinguish these obligations which he was unable to meet, he agreed to reconvey to Birkey certain tracts of the land. In the spring of 185

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arrangements to take possession of these lands, with their tenants, stock, farming utensils, &c., &c. Ruffner then refused to let them have possession. Finding they could not obtain possession [ \* 120 ] without great and ruinous delay, \* a proposition was made to sell or release all their interest in the lands of the firm, if Ruffner would pay in cash the amount of money advanced by them. After some negotiations and calculations this amount was ascertained 'to be about twenty thousand dollars. They professed a willingness to receive this amount, if paid in cash, or security given that it should be actually paid in six months. A conditional deed was proposed, by which the title was to become absolute in case payment was not made on the day. But counsel advised that this would be construed a mortgage, in whatever form of words it might be drawn. Ruffner being unable to furnish such security as was required, this agreement was not signed or executed. Proposals were then made to purchase for a larger consideration, to include the farming stock, &c., owned by Brice and Birkey, on a credit running ten years. On these terms they demanded forty thousand dollars, and Ruffner offered thirty-six thousand, and finally the amount of thirty-eight thousand was agreed upon, as set forth in the contract referred to.

Now the hearsay testimony of witnesses, who relate what they "*understood*" from conversations with the parties, or may have misunderstood to be the contract between them, and their inference, because the parties had a "*settlement*," that therefore the first terms proposed, but not accepted, amounted to the ascertainment of a debt due, cannot be received to contradict the written contract of the parties and the testimony of witnesses cognizant of the whole antecedent history of the transaction. Nor is there any irreconcilable discrepancy between their impressions or "*understandings*," and the written agreements and other testimony. They construed the "*settlement*" of the difficulties, which had long existed between the parties, to mean a balance of accounts of money due from one party to the other, and consequently inferred that the increased amount of the securities was for usurious interest for the forbearance of its payment. This was but the usual error of arriving at a false conclusion by the use of equivocal or ambiguous terms.

[ \* 121 ] \*The decree of the court below is, therefore, erroneous, in so far as it is affected by the assumption that the contract was usurious.

Decree of the circuit court reversed, and record remitted, with directions to proceed in conformity to the opinion of this court.



Cromwell v. Pierce.

## THE ISLAND CITY.

H. B. CROMWELL and others, Appellants, v. PIERCE and others.

1 Black, 121.

## ADMIRALTY—DERELICT—SALVAGE.

1. To constitute a case of derelict, the abandonment must have been final, without hope of recovery or intention to return. For the crew to leave the vessel temporarily, with intention to return after obtaining assistance, is no such final abandonment.
2. Where the danger from which the vessel was rescued was continuous, the schooner Kensington first assisting, then telegraphing for the Forbes, which also aided, but, after relieving the first peril, had to leave her anchored, but not in entire safety, while she went for coal, and then the Westernport found her and brought her into a port of safety: held, that it was a continuous peril, in which all the vessels named contributed to the rescue, and were entitled to salvage.
3. The usual rate proportion, of one-third to the owners of the rescuing vessel and two-thirds to the officers and crew, of what is allowed to that vessel, must be affirmed in this case, though the vessel was a steamer, because there is nothing in the pleadings or proofs raising the question.
4. But this court recognizes the fact that, in the case of a steamer, where that kind of motive power is the main element of success in the rescue, the rule may be different, and holds itself uncommitted when the question shall be fairly raised and argued before it.
5. While embezzlement or theft, secretly done by one or two of a crew, will not forfeit the right of others to salvage, a general plunder and stealing by officers and crew, which must have been known, without efforts to prevent it, will, as in this case, justify a refusal to allow any salvage to the officers and crew, and it lapses to the owners of the vessel.

THIS is an appeal from the circuit court for the district of Massachusetts. It was a libel in admiralty in the district court for salvage, which was removed into the circuit court on account of interest of the district judge. The circuit court decreed that \$13,000 of salvage services was rendered. It gave \$3,300 to the Kensington, \$5,200 to the Forbes, and, found that \$4,500 had been earned by the Westernport. Of this sum one-third was decreed to the owners of the Westernport, and the other two-thirds, which would otherwise have been decreed to the crew of that vessel, was declared forfeited to the claimants of the Island City, by reason of the embezzlement and other misconduct of the officers and crew of the Westernport.

The owners of the Westernport also appeal.

*Mr. Dana*, for appellants.

*Mr. Curtis*, for appellees, claimants of the Island City.

\*Mr. Justice GRIER delivered the opinion of the court. [ If the barque "Island City" was derelict when she was

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The Island City.

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rescued by the Westernport, the libelant would be entitled to the usual allowance for salvage in such a case, without regard to previous unsuccessful attempts to rescue her by the Forbes and the schooner Kensington.

The owners of the barque have not appealed from the decision of the court on the libel filed by the other alleged salvors. But the decision of those cases may be collaterally challenged in this, in so far as they affect the rights of the libelant, if his vessel was entitled to the whole, and has received but one-third.

[ \* 128 ] \*The first question, then, is, whether the salvaged barque was derelict, or totally abandoned by her crew and the others who claim to have commenced the salvage service, which, it is admitted, was successfully concluded by the Westernport.

When the barque was discovered by the Westernport, on the 30th of January, 1857, in Vineyard Sound, she was dismasted, and her rudder gone; she was held only by her stream anchor and a heavy chain. She was liable, in case of a storm of wind from the east, to be driven by the ice on shoals, and lost. The crew had left her thus apparently abandoned. The Westernport was, therefore, justified in taking possession of her, and taking her to a place of safety in the port of Hyannis, and to have a liberal salvage compensation, even if it should turn out that the barque had not been derelict.

To constitute a case of derelict, the abandonment must have been final, without hope of recovery, or intention to return. If the crew have left the ship temporarily, with intention to return after obtaining assistance, it is no abandonment, nor will the libelant be entitled to the salvage as of a derelict.

The testimony in this case fully justifies the decision of the court below, that when the barque was discovered by the Westernport she was not derelict.

The peril from which the barque was finally rescued by the interposition of the Westernport was begun previous to the 23d of January, when the barque was first discovered by the schooner, and the salvage service was first commenced. The barque was in her greatest peril at that point, and was with much difficulty taken by the schooner to a place of greater comparative safety; but she was unable to put the barque in a place of absolute safety in the port of Hyannis. The peril was not ended. The schooner being unable to complete the rescue, gave notice, by telegraph, to the owners at Boston, who dispatched the steamer Forbes to the assistance of the barque.

The Forbes then takes possession of her, and, finding it imprac-

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Cromwell v. Pierce.

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licable, on account of the ice, to take her into the port of Hyannis, attempts to take her to Provincetown. After encountering much peril and difficulty from the tides and the ice, it is discovered that their supply of fuel is insufficient, \*under the [ \* 129 ] circumstances, to take themselves, with the barque in tow, to Provincetown. They then conclude to anchor the barque, with her remaining anchor and heavy chains, in a position of greater comparative safety, where she would most probably be able, though not out of peril, to ride out the storm till the Forbes should return. The crew of the barque departed in the steamboat, intending to return, believing they could render more service by expediting her return, while they could be of no service by remaining on board the barque. They were detained at Provincetown much beyond their expectation, from the impossibility of sooner obtaining a supply of coal, and were unable to return till after the Westernport had taken possession of the boat, and brought her safely into the port of Hyannis. We concur, therefore, in the opinion of the circuit judge, that the barque was not abandoned after the salvage service commenced; that it was one continuous peril from which the barque was rescued, and that each of the several salvors contributed to the final result. The amount allowed for the salvage service was liberal, and the apportionment of it among the several salvors just and proper.

It has been contended *here*, that the court, in apportioning the salvage allowed to the Westernport as between the owners of the boat and the crew, should not have followed the established rule of giving but one-third to the ship, and two-thirds to the crew; that it is the power of steam, which is the chief agent in the rescue, and the danger, if any, is to the boat and cargo, and the enterprise and perils of the crew comparatively unimportant. We admit that there may be cases in which a court might be justified in not adhering rigidly to the rule; but in this case, the question was not properly raised by the pleadings or evidence, so as to justify the court in departing from it. The evidence shows that considerable danger and hardship was encountered by the crew, and it is only after the court have adjudged their claim to have been forfeited by their misconduct, that fault has been found with the apportionment. In establishing a new rule as regards steamboats, the parties interested in the decision of the question, and claiming adverse interests, should both be heard, and a proper issue made \*between them, where the testimony taken should have [ \* 130 ] direct reference to the issue to be decided. In this case the crew had no counsel to contest the question adversely

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The Island City.

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Lastly, it has been contended, that the decree of the court, forfeiting the salvage apportioned to the crew on account of their misconduct, is necessarily harsh and severe, and ought to be reversed. The principles of law which should govern the case are correctly stated by the circuit judge in the following summary from adjudged cases :

“Public policy encourages the hardy and industrious mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to embezzlement and dishonesty, the law allows him, in case he is successful, a liberal compensation. Those liberal rules as to remuneration were adopted, and are administered not only as an inducement to the daring to embark in such enterprises, but to withdraw, as far as possible, every motive from the salvors to depredate upon the property of the unfortunate owner. While the law is thus liberal as to compensation, it requires on the part of the salvors the most scrupulous fidelity. It visits, says a learned judge, any embezzlement, although small, with an entire forfeiture of all claim for salvage. It not only withholds the extraordinary reward allowed to the honest salvor as a premium for his courage and hardihood, but, by way of penalty for his fraud, deprives him even of a *quantum meruit* for his labor. While the general interests of society require that the most powerful inducements should be held out to men to save life and property about to perish at sea, they also require that those inducements should likewise be held forth to a fair and upright conduct with regard to the objects preserved. Compensation for salvage service presupposes good faith, meritorious service, complete restoration, and incorruptible vigilance, so far as the property is within the reach or under the control of the salvors. Salvors are required by the nature of their undertaking, and by a due consideration of the large award allowed them for their services, to be vigilant in preventing, detecting, and exposing every act of plunder upon the property saved ; [ \* 131 ] and if they are guilty of \* embezzlement, whether at sea, in port, or even the property is delivered into the custody of the law, it works a forfeiture of their claim to salvage. When secret, and purely an individual act, it is justly held not to prejudice co-salvors, who are innocent. But all may become guilty by consenting thereto, or by connivance, concealment, or encouragement afforded to the actors, or by not preventing the act when it is in their power.”

On a careful examination of the testimony, we concur with the

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court below in their application of these principles to the case before us.

The embezzlement proved was not the secret act of one or two of the crew. A general system of plunder seems to have been carried on while the barque lay at the wharf in Hyannis, and before the crew returned to claim their property. In this the officers and crew of the Westernport seem all to have been actively or passively implicated. Locks were broken, chests and trunks forced open, and clothing, money, and other articles of value were carried away, and never returned. Those who did not actively participate in this systematic and general pillage have connived and consented thereto, and have justly been decreed to have forfeited all right to compensation.

Decree of the circuit court affirmed, with costs.

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JOHN O'BRIEN, Plaintiff in Error, v. ELIZA M. PERRY.

1 Black, 132.

MISSOURI LAND LAW.

1. Under the 3d section of the act of 1832, and the supplementary act of March 2, 1833, concerning Missouri land titles, a claimant under a Spanish grant, who relinquished his claim, had a right to purchase the land as a pre-emptor, at the minimum price of the public lands, whether an actual settler on it at that date or not.
2. The fact that a town lot had been confirmed to claimants under the act of 1812, which was a part of the land claimed under the act of 1832, did not invalidate his right to purchase under this latter act the whole tract of 640 acres.
3. The commissioner of the land office erred in setting aside the certificate of entry made by the register and receiver to the claimant, and in granting a patent to another purchaser of the land.
4. While it is true, as a general rule, that this error can only be corrected in a suit in chancery, yet where, as in the State courts of Missouri, law and equity are blended in their proceedings, and a party having an equitable defense to an action of ejectment is bound to set it up, this court will, on a writ of error, affirm the judgment of the supreme court of the State which sustains the equitable title.

WRIT of error to the supreme court of the State of Missouri. The facts are well stated in the opinion.

*Mr. Neill*, for plaintiff in error.

No appearance for defendant.

\*Mr. Justice NELSON delivered the opinion of the court. [ \* 134 ]

This action was brought by the plaintiff, O'Brien, to recover possession of a part of section fifteen in township thirty-seven. He claimed title under a patent of the United States, dated

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May 4, 1854, which was founded upon a pre-emption certificate under the act of 1841, dated July 3, 1847. His possession or settlement began in April the same year.

The title which the defendants set up began as early as 1795, under Basil Valle, who settled upon the premises, which were situate at a place called Mine au Breton, in Missouri, and continued cultivating and improving the same down to the year 1806, when he sold and conveyed all his interest to John Perry, the ancestor of the defendants. In 1807, Perry, as assignee of Valle, presented the claim before the board of commissioners, enlarging it to six hundred and thirty-nine acres. No decision seems to have been made upon the claim till the meeting of the board in 1811, when it was rejected.

In 1825, William and John Perry, who had become the owners of the claim, had confirmed to them a town lot and out-lot of the village of Mine au Breton, lying within and constituting a part of the original tract of six hundred and thirty-nine acres, under the act of 1812 and the supplemental act of 1824. The dwelling-house of the Perrys was situate on this village lot.

In 1833 the claim was again presented to the board of commissioners, under the act of 1832 and the supplemental act of 1833, and further proof in support of it produced. No decision was made by the commissioners.

In August, 1834, John Perry, jr., who was then the owner, relinquished all right and title to the claim, by metes and bounds, including the whole tract of six hundred and thirty-nine acres, to the United States, and afterwards applied to the register and receiver to make his entry as purchaser of the tract under [ \* 135 ] \* the act of 1832, which was permitted on the 26th of November, 1839, satisfactory proof of possession, inhabitation, and cultivation having been furnished, and the purchase money paid. This entry was made under the direction of Whitcomb, the commissioner of the land office; but, on an appeal to his successor by adverse claimants, the entry was canceled on the 5th May, 1843, three years and a half after Perry's entry, and which decision was concurred in by the then secretary of the treasury.

Subsequently, in 1847, as we have seen, the plaintiff O'Brien was permitted to make an entry for a part of the same premises, and in 1854 a patent was issued to him.

Upon this state of the case and condition of the title, the court below held that, by virtue of the waiver and relinquishment of his claim under the act of 1832, Perry became thereby entitled to a pre-emption of the land relinquished, and that the subsequent cancel-

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lation of his entry by the commissioner was contrary to law, and void.

By the first section of the act of 1832, a board of commissioners was appointed to examine all unconfirmed claims to land in the State of Missouri, theretofore filed in the office of a recorder, founded upon incomplete grants, &c., under the authority of France or Spain, prior to the 10th March, 1804, and to class the same so as to show: 1, what claims, in their opinion, would have been confirmed according to the laws, usages, and customs of the Spanish government and the practice of the Spanish authorities, if the government under which the claims originated had continued in Missouri; and, 2, what claims, in their opinion, are destitute of merit in law or equity under such laws, usages, and customs, and practice of the Spanish authorities.

The third section provided that, from and after the final report of the board of commissioners, the lands contained in the *second class* should be subject to sale as other public lands, and the lands contained in the *first class* should continue to be reserved from sale as theretofore, until the decision of Congress upon them, provided that actual settlers, being housekeepers upon such lands as are rejected, claiming to hold under such \*rejected [\* 136] claim, or such as may waive their grant, shall have the right of pre-emption to enter, within the time of the existence of this act, not exceeding the quantity of their claim, and which in no case shall exceed six hundred and forty acres, including their improvements. And it is made the duty of the secretary of the treasury to forward to the several land offices in said State the manner in which all those who may wish to waive their several grants or claims, and avail themselves of the right of pre-emption, shall renounce or relinquish their said grants.

In the instructions to the board of commissioners by the commissioner of the general land office, under date of 2d November, 1832, he observes, that this 3d section of the act above recited provides that actual settlers, being housekeepers at the date of the act, upon such claims alleged and filed in the mode specified in the first section, as are rejected, and who claim to hold under such rejected claim, and also, *that all claimants who may relinquish to the government claims of the characters* designated in the first section, prior to any decision thereon by the board, shall have the right of pre-emption. He also directs, that the recorder furnish to the party relinquishing a certified copy of his relinquishment, which shall be evidence of his right to the pre-emption privilege intended to be conferred by the act. The supplementary act of March 2, 1833,

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extended the provisions of the act of 1832 to all claims for donations of land in Missouri, held in virtue of settlement and cultivation. This supplementary act embraced the class of claims to which the one in question belongs. As the relinquishment was made by Perry in conformity with the third section of this act of 1832 and the instructions of the secretary of the treasury, it is difficult to see any well-founded objection to his right of entry of the land as a pre-emptor, which was permitted by the register and receiver upon satisfactory proof of inhabitation and cultivation on the 26th November, 1839. Indeed, according to the instructions from the commissioner of the land office, the certified copy of the relinquishment would seem to be sufficient evidence of the right of pre-emption, even without further proof.

[ \* 137 ] \* But this entry was canceled on the 5th May, 1843, by directions of the then commissioner of the land office, and which raises the principal question in the case. As has already appeared, William and John Perry, who then owned the claim, had confirmed to them, in 1825, a town lot and out-lot at the village of Mine au Breton, embracing some eight or ten acres, under the act of 1812, and the supplementary act of 1824, and which were included within this claim. The dwelling house and out-houses of the Perrys were situated on this town lot, and, indeed, had been thus situated since the purchase from Basil Valle in 1806. The commissioner held, that, upon a true construction of the third section of the act of 1832, no claimant was entitled to the right of pre-emption unless he was an actual settler, being also a housekeeper, on the land at the date of the act, and that the condition applied as well to the party relinquishing his claim to the government as to him whose claim had been rejected. And as the town lot, upon which stood the dwelling house of the Perrys, had been confirmed under the act of 1812, he was of opinion it became thereby separated from the remaining portion of the claim, and, therefore, they were not settlers and housekeepers on the part entered in November, 1839. And this view being concurred in by the secretary of the treasury, the register and receiver were directed to cancel the entry of the Perrys.

Now, assuming the construction of the third section, as declared by the land commissioner, to be correct, and that the Perrys must prove they were actual settlers and housekeepers on the land at the date of the act, we think the conclusion arrived at not at all warranted. The confirmation of the title to the town lot in 1812 did not, in any just or legal sense, affect their claim to the remaining portion of the land, or change the character of the settlement or



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inhabitation. For aught that appears, the occupation and claim continued the same after the confirmation as before, except that, being secure in the title to the town lot, they were concerned only in their future efforts to obtain the title to the other portion of the land. The act of 1812 was a general act confirming town lots, out-lots, &c., to the inhabitants of villages, and the argument would seem \* to go the length of requiring the inhabitant [ \* 138 ] to reject the confirmation of his village lot upon which his dwelling stood, or forfeit his right to a confirmation of the adjoining plantation, and of holding that his entire claim could not be confirmed in parts by two different acts.

But the conclusive answer to the objection of the commissioner is, that Perry was an actual settler and housekeeper, on the land he relinquished to the government, at the date of the act, as the deed of relinquishment embraced the village lot and dwelling house, as well as the other portion of his claim; and although the entry was permitted only for the portion less the town lot and out-lot, this was not the fault of the claimant, but that of the register and receiver, and cannot be justly used to his prejudice.

We have thus far assumed that the construction of the third section of the act of 1832 by the commissioner, at the time of the cancellation of the entry of Perry, was correct, and have endeavored to show that the conclusion arrived at upon his own premises was erroneous, and afforded no justification for setting aside the entry made under the direction of his predecessor.

But this construction differed from the instructions of the department at the time of the passage of the act, and which were furnished to the land officers, to guide them in its execution. As we have already said, that construction dispensed with the necessity of requiring the claimant to prove that he was an actual settler and housekeeper on the land, in all cases of claims pending before the board of commissioners, and undecided. The rejected claims were declared to be public lands, from the time of their rejection by the board; and, of course, no relinquishment was necessary to vest the title in the government. The claimants were then in the condition of those who had no claim on the bounty of the government, except as actual settlers on the land, which furnished a meritorious ground of right to a pre-emption. But the case of claimants whose claims were still under consideration and undetermined was altogether different. They might still be confirmed; and, in that event, the treasury would derive no benefit from them. \* Congress, therefore, proposed to this class, [ \* 139 ], that if they would relinquish their claims to the govern-

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ment, they should have the right to enter the lands at the minimum price, in preference to all others. This was the inducement held out to them to relinquish their claims. The government had no pecuniary interest, so far as the pre-emption right was concerned, after the relinquishment, whether given to the claimant or to some subsequent settler. The minimum price was all it could receive for the land. The proposal was a compromise, offered to this class of claimants. Actual settlement and housekeeping on the land, at the time of the passing of the act of 1832, were not essential prerequisites of their claims before the board as Spanish claims; they depended upon the settlement right, under the act of 1807, and subsequent acts relating thereto.

Without pursuing this branch of the case further, we are entirely satisfied that the commissioner of the land office erred in canceling the entry of Perry, made in 1839, and that it was contrary to law, and void, as was also the issuing of the patent to O'Brien, upon his subsequent entry for a part of the same land in 1847. This was so held in *Lyttle v. The State of Arkansas*, (9 How. 314,) and in *Cunningham v. Ashley*, (14 ib. 377;) see, also, *Minter v. Crommelin*, (18 How. 87.) It is true, in the first two cases, bills in equity were filed in the court below by the persons claiming under the pre-emption right to set aside the patent in one of the cases, and a location, which operated to pass the legal title in the others.

But in the present case, which comes up from a decision in the supreme court of Missouri, though the action was at law by the patentee, to recover the possession, according to the practice of that court, it is competent for the defendant to set up a prior equitable title in bar of the suit, founded upon the legal title to the premises in dispute.

Judgment affirmed.

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JOSEPH BRYAN, Plaintiff in Error, v. THE UNITED STATES.

1 Black, 140.

SURETIES IN OFFICIAL BONDS—APPROPRIATION OF PAYMENTS.

1. A surety in an official bond is liable only as regards his principal's accounting for money actually received by him during his term of office, and cannot be held for money paid by the government to his agent after the term of his office has expired.
2. Nor can the surety be held liable upon the hypothesis, unsupported by evidence, that his principal had raised money on the anticipation of drafts for which he had made requisition, but which drafts had not been received by him prior to the expiration of his term, and of which there is no evidence that he or his agent ever did receive them or their proceeds.

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WRIT of error to the circuit court for the District of Columbia. The case is stated in the opinion.

*Mr. Bradley* and *Mr. Carlisle*, for plaintiff.

*Mr. Bates*, attorney general, and *Mr. Coffee*, for defendants.

\* Mr. Justice NELSON delivered the opinion of the court. [ \* 145 ]

This is a writ of error to the circuit court of the United States for the District of Columbia.

The suit was brought by the United States upon the official bond of Samuel D. King, surveyor general of the public lands of the State of California, against Joseph Bryan, one of his sureties, for moneys received by the principal in the course of the execution of the duties of his office, and which he has not accounted for. The bond was executed on the 29th of March, 1851.

The plaintiff gave in evidence several treasury transcripts, by which it appeared that, on 30th June, 1853, when King's term of office expired, which was the end of the second quarter of that year, there was a balance due him to an amount exceeding three thousand dollars, although at the end of the first quarter there was a balance against him of some \$14,000. But there appeared, also, on the debit side, charged to him, three treasury warrants, each dated July 9, 1853—one of \$10,000, another of \$6,500, and the third \$3,500, making an aggregate of \$20,000, and which sum, if properly chargeable against the sureties, would leave a balance due the plaintiff of \$10,531.43. As these warrants bore date on their face, after the expiration of the term of office, which was, on the 30th June, 1853, unexplained, they were of course not so chargeable.

The plaintiff assumed the burden of this explanation, and for that purpose gave in evidence a requisition by King upon \* the commissioner of the land office, dated San Francisco, [ \* 146 ] May 30, 1853, giving, in the communication, a general estimate of the sums of money that would be required to meet his disbursements for moneys due in the first quarter of the year 1853, and to become due in the second quarter. These estimates correspond with the sums for which the three treasury warrants of the 9th July were drawn. A letter also accompanied the estimates and requisition, explaining somewhat at large the grounds of the estimates, and the necessity for the amounts required. They were received by the commissioner in this city on the 25th June following. The requisition of King contained a request that the drafts of the treasurer for the advance of the moneys called for should be

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made in favor of Charles D. Meigs, cashier of the American Exchange Bank in the city of New York.

It was in pursuance of this requisition, and letter accompanying the same, that the three treasury warrants of the 9th July were drawn for the \$20,000; and on the 11th of the month the treasurer drew at sight upon the assistant treasurer in the city of New York three bills in favor of Charles D. Meigs, corresponding in amount with the treasury warrants.

The plaintiff also proved that the commissioner of the land office, on the 30th June, had given notice to Meigs that he had on that day made a requisition in his favor at the request of King for the \$20,000. This referred to the requisition of the commissioner on the treasury department for the advance of the money, and in pursuance of which, doubtless, the treasury warrants and drafts in favor of Meigs, already referred to, were afterwards drawn. It will be observed, that the treasury warrants were made out nine days, and the drafts drawn in favor of Meigs eleven, after the office of King had expired.

Upon this state of facts, the court below instructed the jury, if they should find from the evidence that King, the surveyor general, prior to the 30th June, 1853, paid certain amounts due to himself and other creditors of the government upon the accounts and salaries, office rents and contingencies, given in evidence, out of moneys raised by him upon orders or drafts drawn upon the government, [ \* 147 ] and by him made known to the \* government to have been drawn for the amounts to which the said payments were in fact applied, and that said drafts were paid and said amounts reimbursed to him by the government after the 30th June, 1853, then it is not competent for the defendant to apply the amount of those accounts, thus by him paid and extinguished, as a set-off against the amount due by him to the government upon the survey account prior to June 30, 1853, as given in evidence.

In order to understand these instructions, it is necessary to refer to some facts already stated, namely, that, according to the treasury transcripts given in evidence by the plaintiff containing a statement of the accounts between King and the government, debit and credit, down to the 30th June, 1853, when his office ceased, a balance appeared in his favor of some \$3,000; but a requisition had been made by him on the 31st May, 1853, during his term of office, on the commissioner, for the \$20,000, and in pursuance of which the three treasury warrants were made, and drafts drawn in favor of Meigs, of New York, after the office had expired, and that, at the end of the first quarter, the balance was against King.

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Now, in view of these facts, the instructions are, if the jury find that King, prior to the 30th June, 1853, (the period when his office expired,) paid the money for which credits were given in the treasury transcripts, out of money raised by him upon orders of drafts drawn upon the government, and which were made known by him to the government to have been so drawn, and that these drafts were paid and the money disbursed by the government after the 30th of June, 1853—that is, after his office expired—then it was not competent for the defendant, the surety, to apply the moneys thus paid by King as a set-off against his indebtedness to the government on the survey account prior to the 30th June, 1853, referring, doubtless, to the balance due by him at the end of the first quarter.

In other and shorter words, if King drew on the government during his term of office, and notified the government of the fact, and raised money upon these drafts, by which he obtained the credits in the treasury transcripts, and the government paid the drafts even after King went out of office, then the \*surety could not claim these credits, and would be liable [ \* 148 ] for all moneys in his hands at the expiration of his term not thus applied.

The first observation we have to make upon these instructions is, that they were given to the jury upon a purely hypothetical case, unsupported by any evidence to which it could be applied.

There is no evidence in the case to show out of what particular moneys King paid the expenses of his office during the period referred to, and obtained the credits, or that he raised any money for this purpose by means of drafts on the government, or that the government paid any drafts drawn by him before or after the expiration of his term of office. The only evidence relating to this subject is the requisition of King upon the commissioner of the land office, already referred to, dated the 31st May, 1853, and received the 25th June by the commissioner, five days before his office expired, and the treasury warrants of the 9th July, and drafts in favor of Meigs of the 11th for the \$20,000. These furnish all the evidence of any drafts upon, or disbursements by, the government in the case.

The next observation we have to make is, that there is no evidence in the case that the government has advanced any portion of the \$20,000 to King, either during his term of office or since. It is true, the treasury warrants were made out and charged to him, and drafts drawn in favor of Meigs by the treasurer upon the assistant treasurer in the city of New York for this amount on the 9th

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and 11th of July, 1853. But there is no evidence that these drafts ever came to the hands of Meigs, or that the assistant treasurer was ever called on to pay, or ever paid them. For aught that appears, the money may still be in the treasury. These are facts which, if material to charge the surety, should have been proved, and not left to presumption or conjecture; and even if we were to presume all this, and believe, without proof, that the government transmitted the drafts to Meigs, and that he received the moneys from the assistant treasurer, there is no evidence that the money [ \* 149 ] came to the hands of King. We are not prepared to \*admit that the transfer of moneys by the government to the agent of the officer is equivalent to a transfer to the officer himself, so far as the liability of the surety is concerned. The fidelity or responsibility of the agent through whom the government may see fit to thus transfer the public money, is not within the obligation assumed by the surety in the official bond. He is responsible only for all moneys which came into the hands of the officer while in office, and which he subsequently fails to account for and pay over. 12 Wh. 505.

The questions, therefore, put to the jury as to drafts drawn by King upon the government, and of moneys having been raised upon them during his term of office, out of which he had obtained the credits given in the treasury transcripts, and of the subsequent payment of the drafts by the government, were entirely hypothetical, unsupported by the evidence in the case, and, of course, whichever way found, laid no foundation for the inference stated in the instructions, that the surety could not claim these credits, and would be liable for all moneys in the hands of the officer at the expiration of his office not thus applied.

As the case has been very imperfectly tried, and must be set down for another trial, we shall make no observations concerning it in anticipation of the facts that may be proved on the part of the government, except to say, that in order to charge the surety for the default of the officer, it must appear from the evidence that the public moneys in question came into his hands, either in point of fact or in judgment of law, previous to the time when the term of office expired.

Judgment reversed, *venire de novo*.

## RICHARD GREGG, Plaintiff in Error, v. TESSON.

1 Black, 150.

## PEORIA TOWN LOTS—LIMITATIONS.

1. Where a patent from the United States, contains a reservation of the rights of all persons claiming under the act of 1823, conferring claims to lots in Peoria, and the plaintiff claims under that act, with a survey made in 1840 and a patent in 1846, the latter, though the junior patent, is the better title.
2. But such senior patent is color of title, under which a defendant may set up adverse possession of seven years under the statute of Illinois; and, by the decisions of the State courts of Illinois, possession of part of the land included in this patent, with claim of the whole, will be held to extend to and include the village lot, where no actual possession had been had of that lot by either party.
3. The fact that plaintiff claimed under a *feme covert* does not prevent the running of the statute, when she joined her husband, who had a life estate, and who could have sued during this time for the possession.

WRIT of error to the circuit court for the northern district of Illinois. The case is stated in the opinion.

*Mr. Ballance*, for plaintiff.

*Mr. Browning*, for defendant.

\*Mr. Justice NELSON delivered the opinion of the court. [ \* 152 ]

This is a writ of error to the circuit court of the United States for the northern district of Illinois.

The action was ejectment, brought by Tesson against Gregg, to recover possession of lot No. 33, the claim of Antoine Roi, as reported under the confirmatory acts of congress of 15th May, 1820, and of 3d March, 1823, in respect to French inhabitants or settlers of lots in the village of Peoria. A survey was made of these lots in 1840, and a patent issued to the representatives of Antoine in 1846.

The plaintiff claims under this title.

The defendant sets up a right to the possession under Charles Ballance. The latter claims title under a patent from the government, in 1838, of the southwest fractional quarter of section nine, in township 8 north, range two east, in the district of lands subject to sale at Quincy, Illinois. This patent containing the following saving clause: "Subject, however, to the rights of any and all persons claiming under the act of congress of 3d March, 1823, entitled 'An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois.'" The French lot No. 33, in question, confirmed by the act of 3d March, 1823, is within this fractional quarter section above patented to Ballance.

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If the question in the case stood upon the mere paper title to this lot, there could be no great difficulty in disposing of it; for, although the patent of Ballance is the elder, yet, as he took it subject to the French confirmed title, the latter must prevail.

But this court held, in the case of *Bryan v. Forsyth*, (19 How. 334,) for the reasons there given, that the patent of the fractional quarter section to Ballance, though subject to the saving clause mentioned, afforded ground in favor of persons claiming under it of an adverse possession within the statute of limitation [ \* 153 ] of Illinois, against the French lots, after the \*survey and designation of them in 1840. Several cases have arisen since that decision in the State courts of Illinois, and also in this court, and the doctrine of the case of *Bryan v. Forsyth* adopted and applied. *Landers v. Kidder*, (23 Ill. R. 49;) and *Williams v. Ballance*, (ib. p. 193;) *Meehan v. Forsyth*, (24 H. 175;) and *Gregg v. Forsyth*, (ib. 179.)

The act of limitations of Illinois, (Rev. Stat. 349, sec. 8,) protects the claim of persons for lands which has been possessed by actual residence thereon, having a connected title in law or equity, deducible of record from that State or the United States.

The question contested upon this statute, since the case of *Bryan v. Forsyth*, has been, as to the nature and character of the possession of Ballance, and those claiming under him, required by the statute, which is essential to constitute the bar. On the part of those claiming under the French lots, it has been insisted that the *actual residence thereon* for the seven years must have been on the French lot; and that an actual residence on the fractional quarter section, under and by virtue of the patent to Ballance, claiming at the time the whole section, did not raise an adverse possession, within the act. But the court of the State of Illinois, in the two cases above referred to, adopted the broader construction; and this court agreed with them in the two cases already referred to.

As we understand the cases, both in this and in the State court of Illinois, they hold that the actual residence of Ballance, by himself or by his tenants under him, upon the fractional quarter section, cultivating and improving the same, and claiming title to the whole under his patent, for the period of seven years since the survey and designation of the French lots in 1840, operate as a bar to the right of entry, within the true meaning of the seven years' statute of limitations. These cases have been so often before the court, and so fully considered heretofore, that we shall do no more than state the principles decided in them.

The suit in this case was commenced in 1854, and the actual res-



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idence of Ballance, by himself and tenants, began in 1834, and continued down to the commencement of the suit.

\* A point has been made on the part of the plaintiff, [ \* 154 ] that the statute cannot run against him, on the ground that, at the time of the commencement of the adverse possession, Mrs. Gendron, the daughter and heir of Antoine, and through whom the plaintiff derives title, was a *feme covert*, and within the saving clause of the statute of limitations; and that the seven years has not elapsed since she parted with her title. But the answer to this is, that her husband, who joined her in the deed, is still alive; and as he had a life estate in the lot, and was competent to sue for the recovery of it, the statute ran against him; and the purchaser from or through him took the estate subject to the operation of this limitation. Mrs. Gendron and husband conveyed in 1849, while the statute was running against the husband. The grantee, or those coming in under him, should have brought the suit for the husband's interest within the seven years. After the termination of the life estate, the person holding the interest in remainder may then bring a suit to recover the estate of the wife.

The defense in this case was placed, also, upon another ground, which it may be proper to notice. Mrs. Gendron, through whom and her husband the plaintiff derives title, was the daughter of Antoine, the French claimant, and was born, as alleged, some three months before the marriage of Antoine to the mother—was, therefore, illegitimate, and incapable of inheriting the lot from her father, who, it is supposed, died about 1820. The birth and subsequent marriage, however, took place in the territory of Missouri in 1814, when the civil law prevailed in that territory, which legitimates the child by a subsequent marriage. But as the lands in question are situate within the State of Illinois, in which State, and in the territory preceding it, the common law, as alleged, prevailed at the time of the death of Antoine, and the descent cast, it is claimed, within the case of *Birch Whistle v. Vardell*, (5 Bar. & Cross, 430, and 7 Clark and Finnelly, 895,) which held that a child born in Scotland, where the civil law prevails, and which was legitimated by the subsequent marriage of the parents, could not inherit lands in England, as, in case of an inheritance at common law, the child must be born within lawful \* wed- [ \* 155 ] lock. Mrs. Gendron did not inherit the lot in question, and hence the deed from her and husband conveyed no title to the plaintiff.

How the law may be on this subject in the State of Illinois we do not deem it material to inquire, as the evidence in the case is

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not sufficiently full nor exact to raise the question. The territory of Illinois was admitted as a State into the Union in 1818. The time of the death of Antoine is not proved; whether during the territorial government, or the State, is uncertain. Until that fact is established, it would be difficult, if not impossible, to determine the state of the law at the time of the descent cast, on the subject.

This question has been one of great difficulty in England, but was ultimately decided against the Scotch heir, with the concurrence of all the judges. The difficulties attending the question in this country, when it arises, will not be diminished, unless settled by the express law of the State within which the lands may be situate.

As it will be seen, on reference to the instruction given to the jury, that they are in conflict with the views expressed of the law on the question of adverse possession, the judgment must be reversed, and the case remitted for a *venire de novo*.

Judgment reversed and *venire facias de novo*.

1b 156  
L-ed 97  
37f 643  
37f 644  
37f 645  
1b 153  
L-ed 97  
38f 184

NELSON and others, Appellants, v. WOODRUFF and others.  
WOODRUFF and others, Appellants, v. NELSON and others.

1 BLACK, 156.

COMMON CARRIER—BILL OF LADING.

1. The signing of a bill of lading, acknowledging the receipt of the goods in good order and well conditioned, is *prima facie* evidence that, as to all circumstances which were open to inspection and visible, the goods were in good order.
2. But it does not preclude the carrier from showing, in case of loss or injury, that it proceeded from some cause which existed when the goods were received, but was not apparent, and for which, if proved, he will not be responsible.
3. But the burden of proof in such case is upon the carrier to rebut the *prima facie* case made by his bill of lading.
4. Lard received in casks in New Orleans in very hot weather, in a liquid condition, by reason of which it so acted on the barrels as to impair their capacity to retain it, resulting in large losses in leakage and evaporation, was not in good order and condition when so received, though apparently it was; and the carrier is not liable for the loss so occasioned.

THESE are cross-appeals from the circuit court for the southern district of New York. The case is fully stated in the opinion.

Mr. Dean, for appellants.

Mr. Graham, for appellees.

[ \* 158 ] \*Mr. Justice WAYNE delivered the opinion of the court.

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We are now about to decide two appeals in admiralty from the circuit court U. S. of the southern district of New York.

They are substantially cross-actions, and the testimony is the same in both. They have been fully argued, and shall be discussed by us with reference to the rights and liabilities of the parties growing out of their pleadings, and the bills of lading upon which they rely.

William Nelson and others are the owners of the ship *Maid of Orleans*, and they have filed their libel to recover from John O. Woodruff and Robt. M. Henning, survivors of the firm of James E. Woodruff & Co., eighteen hundred and thirty-eight dollars eleven cents, with interest from the fourteenth of August, eighteen hundred and fifty-four, for the freight, with primage and average accustomed, of a large quantity of lard which was carried in their ship, in barrels and tierces, from New Orleans to New York, for which the master of the ship had affirmed for the shippers in two bills of lading; that they had been shipped in good order and condition, &c., and were to be delivered in like good order at New York, the dangers of the sea and fire only excepted, to James E. Woodruff & Co., or to their assigns, freight to be paid by him or them at the rate of \$1.15 per barrel, and \$1.50 per tierce, with five per cent. primage and average accustomed; and the libelants declare that the lard, upon the arrival of the ship, had been delivered to the consignees, and was accepted by them.

To this the respondents filed a joint answer, admitting the shipment, claiming that they had been made in conformity \*with the bills of lading, affirming the arrival of the ship [ \* 159 ] in New York, and averring that only a part of the lard had been delivered, and allege that the agents of the libelants had taken so little care in receiving the casks and tierces on board of the ship, and in the stowing and conveyance of them, and in the discharge of them at New York, that a large quantity had been lost, about sixty thousand pounds, of the value of six thousand dollars and upwards, and that the loss or diminution in its weight had not been lost by the perils of the sea, or from fire. They further answer, that, relying upon the bills of lading, the consignees, James E. Woodruff & Co., had made large advances upon them to the shippers of the lard. They then declare that, for cause stated by them, they were not liable to pay the freight and primage, but that the owners of the ship were answerable for the loss of the lard, and liable to pay them more than six thousand dollars, and claim to recoup against the freight and primage so much of the damage as they may have sustained as will be sufficient to

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liquidate and discharge the amount claimed for freight. When they answered the respondents, they at the same time filed a libel against the owners of the ship, propounding substantially the particulars of what was in their answer to the libel—so much so, that we will not repeat them; indeed, there is no addition to it, nor will it be necessary to set out again the articles of their answer to the libel filed against them, for they are a repetition of their own original libel, except in one particular, upon which the controversy was made exclusively to turn by the counsel on both sides in the argument of the case before us. That was, that the lard, as such, had not been in good order for shipping when put on board of the ship, inasmuch as it was then in a liquid state, and had in that condition been put into barrels and tierces, which, with the heat of the weather then and during the passage to New York, had started them, and had caused the leakage complained of before and during its transportation, and that the leakage had not been caused by any neglect or want of care of them, either in shipping the lard at New Orleans, or on the passage thence to New York, or in stowing it in the ship, or in the discharge of it in New York.

[ \* 160 ] There is \* much testimony in the record in respect to the effect of heat and barreling of lard in a liquid state, in producing more than usual leakage; but it was urged in the argument that such proofs were inapplicable to this case, as the bills of lading affirmed that the lard, when shipped, was in good order and condition, and were conclusive against the allowance of any inquiry being made, or to any other causes of loss or damage than such as may have been caused by the dangers of the sea and fire.

Such is not our view of the effect of the bills of lading we have now to consider.

We proceed to state what we believe to be the law, and will then apply the evidence to it to determine if this case is not within it.

We think that the law is more accurately and compendiously given by Chief Justice Shaw, than we have met with it elsewhere. In the case of *Hastings v. Pepper*, (11 Pickering, 43,) that learned judge says: "It may be taken to be perfectly well established, that the signing of a bill of lading, acknowledging to have received the goods in question in good order and well conditioned, is *prima facie* evidence that, as to all circumstances which were open to inspection and visible, the goods were in good order; but it does not preclude the carrier from showing, in case of loss or damage, that the loss proceeded from some cause which existed, but was not apparent, when he received the goods, and which, if shown satisfactorily, will discharge the carrier from liability. But in case

of such loss or damage the presumption of law is, that it was occasioned by the act or default of the carrier, and, of course, the burden of proof is upon him to show that it arose from a cause existing before his receipt of the goods for carriage, and for which he is not responsible." The same has been decided by this court in two cases as to the burden of proof, where the goods shipped were said to have been impaired in quality by the dampness of the vessel during passage to her port of delivery. *Clark v. Barnwell*, (12 Howard, 272;) *Rich v. Lambert*, (12 Howard, 347.)

The rule having been given, our inquiry now will be, whether or not the owners of the *Maid of Orleans* have brought themselves \*within its operation, so as to be exempted [\*161] from all liability for the loss of the lard, by having proved satisfactorily that it had been occasioned by causes existing in the lard, but not apparent when it was shipped, to the extent of the injury which those causes would produce upon the barrels and tierces which contained it; or, in other words, that the causes of the loss were incident to lard when operated upon by a heated temperature of the sun acting directly upon it, or when it shall be stored, and an excessive natural temperature has occasioned its liquefaction. It is alleged that the loss of this shipment was sixty thousand pounds less than the quantity shipped. It must be admitted to be too large to be brought under the rule which exempts the carriers from liability for the ordinary evaporation of liquids, or for leakage from casks, occurring in the course of transportation. The implied obligation of the carrier does not extend to such cases, any more than it does to a case when the liquid being carried, if it shall be conveyed with care, is entirely lost from its intrinsic acidity and fermentation, and bursting the vessel which contains it; as it was adjudged that the carrier was not liable when a pipe of wine during its fermentation burst and was lost, it being proved that at the time it was being carried carefully in a wagon commonly used for such a purpose. (*Farra v. Adams*, Bull. N. P. 69.)

We do not know where an adjudged case can be found illustrating more fully the exemption of a carrier from responsibility for loss or leakage from the peculiar and intrinsic qualities of an article, and the inquiries which may be made upon the trial in respect to them, and into the causes of a loss from effervescence and leakage, and we may say for its discriminating rulings, than that of *Warden v. Greer*, (in 6 Watts' Penn. Rep. 424.) Mr. Angel has made all of us familiar with it in his *Treatise on the Law of Carriers*, ch. 6, 215. The action was brought against the owners of a steamer on account of loss on a cargo of two hundred barrels of

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molasses, which was affirmed in the bill of lading had been received in good order and well conditioned. Witnesses were examined as to the trade in that article on the western waters; the nature of \*molasses and the trade in it; as to its fermentation in warm weather; the effect upon it by heat in its removal and carriage in a dray; also as to the means usually taken to prevent loss of it, and injury to the barrels from the expansive force of fermentation; and as to the loss of it from those means and causes on a passage from New Orleans to Pittsburgh; and as to the loss by leakage or warm weather, according to the condition of the barrels in which it might be shipped. It was determined in that case that the defendants were not answerable for loss occasioned by the peculiar nature of the article carried at that season of the year, nor for leakage arising from secret defects in the casks, which existed, but were not apparent, when they were received on board of the steamer.

Nor is a carrier responsible for diminution or leakage of liquids from barrels in the course of transportation, though they are such as are commonly used for that purpose, if it shall be satisfactorily proved that the barrels had become disqualified from containing their contents by causes connected with the nature and condition of the article, which the carrier could not control.

Having stated the law as we think it to be, that a bill of lading for articles shipped, affirmed to be in good order and condition, is but *prima facie* evidence of that declaration, and does not preclude the carrier from showing that the loss proceeded from causes which existed, but were not apparent, we will now examine the testimony, to determine if such was not the fact in this case.

The lard was taken from the warehouse, to be put on board of the ship, in a liquid state, in the month of July, during hotter weather—much hotter, all the witnesses say—than is usually felt in New Orleans at that time. This was known to the shippers, to their agent, who made the freight by contract, and to the captain of the *Maid of Orleans*. They also knew that the lard was in such barrels and tierces commonly used for the shipment of lard. All the barrels and tierces were put on board of the ship, according to contract, as soon as it could be done, after they were carted to the levee where the ship was, except a few barrels, not more [ \* 163 ] than 20 barrels, which \*needed cooperage, and they were left on the levee from Saturday evening until Monday morning.

There is no proof of leakage or loss from them by that exposure, than there would have been if those barrels had been put on board

of the ship in the bad condition in which they were sent to the levee. Dix, who made the freight engagement in behalf of the shippers, says it was expressly agreed that the lard should be taken on board of the ship as soon as the same was sent to the vessel, to avoid exposure to the sun; and he testifies that the casks containing it were in good order when they were delivered; but anticipating that some of them might not be, a cooper was sent, for the purpose of packing such of them as might not be in good shipping condition; and the witness Shinkle, the stevedore employed to load the ship, says the lard was promptly taken on board as soon as it was taken from the drays, but that there were about fifteen or twenty barrels leaking, which he caused to be rolled aside, and he put them under tarpaulins, to be coopered, and, as soon as they were coopered by the shipper's employees, it was taken. This is the lard, as we learn from another witness, which had been on the levee from Saturday night until Monday morning. Besides, from answers of Mr. Dix to the cross-interrogatories put to him, we learn that he knew nothing of the good order and condition of the casks of lard, as to its cooperage, when they were carried to the levee to be received for shipment, except from the report of those who had done the work. Under such circumstances, the casks put aside on the levee for cooperage, before they could be shipped, on account of their leaking, were not received by the stevedore, to be put on board, until they were put in a fit condition to be shipped. Until that was done, they were at the shipper's risk. We cannot, therefore, allow the fact of the exposure of these twenty barrels to charge the ship with any loss, or to lessen the weight of the testimony that, in receiving and putting the casks into the vessel, it had been done in conformity, as to the time, with the engagement made with the agent of the shippers.

The proof is ample, that it was put on board with care, and in the manner and with all the appliances for doing so most \*readily. It is in proof, also, that the stowage on the ship [ \* 164 ] was good, both as to position and as to its support and steadiness, by dunnage and cantling, and that there had been no disarrangement of the casks, either by storm or rough seas, on the passage of the ship to New York, although she did encounter some heavy weather. Nevertheless, upon the discharge of the lard in New York, the barrels and tierces were found to be in a worse condition, and leaking more, than had ever been seen by either of the witnesses, whose habit and business had made them familiar with such shipments. It appears that the barrels containing the lard

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were of the same materials, and coopered with hoop-poles, as barrels for such a purpose are usually made.

When the contents of such barrels are solidified, the leakage will be small; when liquefied, larger. All of the witnesses, who know how such barrels are coopered, say so, particularly as to lard in a liquid state, and as to its effect upon the staves and hoops of such barrels when acted upon by the heat or rays of the sun. They know it from observation and experience; science confirms it from the composition of the article. This lard was of a secondary kind, or, as the witness Magrath says, it was a fair lard—not pure at all, but a good average lot, not a first-rate article. The differences in the qualities of lard may arise from a deficiency of oxygen, or from the inferior quality of the fat of the animal from which it is tried, and not unfrequently from a careless and insufficient melting and expression of the best of the animal fat from its membranous parts. Oils, whether animal or vegetable, are either solid or liquid, and, when in the first condition, are frequently termed fats. These fats are more abundant in the animal than in the vegetable kingdom. But whether liquid or solid, they usually consist of three substances, two of which (the stearine-suit and the margarine pearl) are solid, and the other (elane or oleine) is liquid at ordinary temperatures. They are all from 6° to 9° lighter than water, and their liquid or solid condition depends upon the proportion in which their component parts are mixed. Thus, in the *fats* the oleine exists in small quantities, and in the liquid [ \* 165 ] oils it is the chief constituent. A certain degree of \*heat is necessary to the mixture, for at low temperatures there is a tendency to separation; the stearine and margarine are precipitated or solidified, and if pressed, can be entirely freed from the oleine. The stearine from the lard of swine is easily separable from the oleine, and it is used in the manufacture of candles. The liquid stearine, known in commerce as lard oil, is used for the finer parts of machinery; but all of the animal fats—such as those from the hog, the ox, the sheep, and horse—have not a like consistency or proportion of stearine in them; when deficient in either, or comparatively small, and tried into lard, they have not that tendency at low temperatures to precipitate and solidify as the stearine and margarine of the fat of the hog has; and being extremely penetrating from liquidity, there has always been a greater loss from evaporation and leakage from the barrels in which they are ordinarily put for transportation than there would be from hogs' lard under the same temperature; in other words, hogs' lard will solidify at a temperature at which those animal fats will not, and, from their



liquidity, they escape from the barrels containing them in larger quantity; and that fact has been remarkably verified by the returns of English commerce with Buenos Ayres and Monte Video, in the importation from them of what is known there as horse or mare's grease, tried from the fat of the horse.

From its liquidity, the ordinary barrels for the transportation of tallow and grease were found to be insufficient, as the casks were frequently half empty on their arrival. The commerce in it was checked for some years, and not resumed until the shippers put it into square boxes, lined with tin, and the article is now carried without loss. And here we will remark, that a distinguished gentleman, thoroughly acquainted with the commerce of our country and its productions, and with its great lard production from the fat of the hog, has made a calculation of the deterioration of the article and the loss of it by leakage from the barrels and casks in which it is now shipped, and his result is, if we would change it for square boxes, lined with tin, that the cost of them would be a saving of the loss now sustained by barreling it.

We have now shown that the cause of leakage of lard is \*its liquefaction under temperatures higher than those at [\* 166] which it will solidify when not deficient in stearine. One legal consequence from that fact is, that shippers of that article should be considered as doing so very much as to leakage at their own risk when it is in a liquid state, however that may have been caused, whether from fire or the heat of the sun, and knowing, too, that it was to be carried by sea at a time from places where there was the higher ranges of heat, through latitudes where the heat would not be less, until the ship had made more than three-fourths of her passage. Such was the case in this instance. When the lard was shipped, the thermometer had indicated for several days, and continued until the ship sailed, a heat of 97°; the ship itself had become heated by it. Her passage was made in the heat of the Gulf Stream until she made the capes of the Delaware, and the witnesses describe the heat of the hold as unendurable upon her arrival in New York.

We have still to show what were the effects of the liquid lard upon the barrels in which it was, and that we shall do briefly by the testimony of several witnesses, and from what we all know to be the additional pressure of an article upon a barrel when liquefied by heat. The pressure from liquid lard is an expansion of its component constituents by heat into a larger bulk than it occupies when solidified, and its elastic pressure distends or swells the barrel which contains it, until the hoops which bind it are slackened, and

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its staves are started ; just as it would be in a barrel containing any other fluid expanded by heat or fermentation. The consequences must be a diminution of the liquid by an increased leakage and evaporation. Now, it so happens that the scientific explanation of the loss of the lard in this instance is verified by the experience of the libelants' and respondents' witnesses. Benzell, a cooper of forty years' experience in New York, in coopering casks of lard from New Orleans to New York, and who coopered this cargo upon its arrival, says the casks were of a good quality, except being slack—that is, hoops started ; hoops were loose upon the casks ; does not think there is any quality in lard to injure casks, [\* 167] except it will, when liquid, tend \*to shrink them ; it requires a great deal of care in such a case ; pressure increases the difficulty from heat, conduces to press upon the joints, and produces leakage ; these casks were fully wooden-bound, but saw them leaking at bilge and at head ; coopered four hundred of them. Ward, the city weigher, and who weighed several hundred casks of this shipment says that they leaked largely ; leakage was from loose hoops. Dibble, another weigher of twelve years' experience in the article of lard, says the lard was in a liquid state, like oil. Wright, who was present all the time when the ship was discharging, gives an account of the stowing of the shipment ; says the packages or barrels were slack. Samuel Candler, marine surveyor, surveyed the cargo in August, 1854 ; made seven surveys on cargo and one on hatch ; saw the lard when on board of the ship ; says it was stowed in the after lower hold in four or five tiers on bilge, and cantling in ordinary way and best ; bilge and bilge stowing not so well ; went below ; it was very hot there ; barrels looked fair, but slack ; the staves were shrunk ; looked all alike ; top casks leaked as well as those on the bottom tier ; attributes the great loss to great heat and shrinking of the barrels ; has surveyed a great many ships laden with lard in hot weather ; this cargo could not have been stowed better ; recollects more of this cargo because there was so much leakage ; nothing stood on the casks, or on the top tier of them, as is afterwards explained ; surveyed ship ; she had the appearance of having encountered bad weather. Francis J. Gerean, who has been accustomed for thirty years with stowing cargoes, says : I coopered this cargo for libelants, Woodruff & Henning ; when the cargo was discharging, two coopers under his direction, one at gangway on deck, the other in the hold of the ship ; he saw the lard in the hold before delivered ; the hoops were very loose, and the barrels were leaking from sides and heads ; intensely hot below ; considerably hotter than on deck ; leakage from

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shrinking of packages ; the lard was liquid ; that tends to shrink ; staves and hoops become loose ; only chime hoops were nailed ; barrels were well stowed ; does not think it possible to stow better ; ground tier was damaged, as well as he judged ; bilge of barrels did not leak ; \* no barrel rested on a single barrel, [ \* 168 ] but on others. Fisher, a large dealer in lard, grease, and tallow, and who has received them at all temperatures of weather, says lard brought in vessels in hot weather will naturally leak ten pounds out of a package ; lard of reasonable quality, in good packages, will leak about the same as oil ; thinks putting liquid lard into barrels will not produce leakage as much as pressure of the barrels upon each other, but stores lard in cellar three to five tiers. Several other witnesses in New Orleans concur in stating that it was very hot weather when the lard was shipped, and that when shipped it was in a liquid state. Others, uncontradicted, testify that it was liquid when the vessel arrived in New York.

There is no testimony in the case impeaching the skill and proper management of the ship on the passage to New York, or in the delivery of the lard there, or that there was any part of her cargo of a nature to increase the heat of the ship, or to liquefy the lard, or to alter or shrink the barrels, though the ship's heat, exposed as she had been to the rays of the sun in New Orleans, was higher than that temperature at which lard will solidify ; and it consequently continued liquid, from the time it was received on board until its delivery in New York, as the ship, on her way to it, was never in a temperature low enough to solidify it.

All the witnesses who were examined in respect to the shrunken and slackened condition of the barrels when they were discharged in New York agree. Two or three of them say they were in a worse condition than they had ever seen or handled, and attribute the loss to the agency of the melted lard upon the barrels.

The result of our examination of these cases is, that though the owners of the Maid of Orleans could not controvert the affirmance in these bills of lading, that the lard of the shippers had been received on board of their ship in good order and condition, they have made out, by sufficient and satisfactory proofs, that the leakage and diminution of the lard was owing to existing but not apparent causes, in the condition of the lard, acting upon the barrels in which it was, which are not \* within the risks guar- [ \* 169 ] antied against to the shippers by the bill of lading. In conclusion, that the signing of a bill of lading, acknowledging that merchandise had been received in good order and condition, is *prima facie* evidence that, as to all circumstances which were open to in-

## The Brig Admiral Collenberg.

spection and visible, the goods were in good order; but it does not preclude the carrier from showing that the loss proceeded from some cause which existed, but was not apparent when he received the goods, and which, if shown satisfactorily, will discharge the carrier from liability. In case of such a loss or damage, the presumption of law is, that it was occasioned by the act or default of the carrier; and, of course, the burden of proof is upon him to show that it arose from a cause existing before his receipt of the goods for carriage, and for which he is not responsible.

We accordingly, with this opinion, affirm the decree of the district and circuit courts, in all particulars, dismissing the libel of Jno. O. Woodruff and Robert M. Henning, and also affirm the decree of the circuit court, with costs, to the libelants and appellees, Nelson, Dennison *et al.*, in all things expressed in the same.

We have not considered the point made in the argument, deeming it to be unnecessary, relating to James E. Woodruff & Co. having made advances, in a large sum of money, upon the faith of the bill of lading, as they were not made with any intention of acquiring property in or ownership of the lard.

We also concur entirely with the view taken by our brother Betts, of the district court, upon the objections made to the admission of the deposition of Capt. Dennis, taken *de bene esse* by the libelants.

Decrees of the circuit court affirmed.

## THE BRIG ADMIRAL COLLEMBERG.

J. S. LAWRENCE, Appellant, *v.* DENBRENS and others.

1 Black, 170.

## CONTRACT OF AFFREIGHTMENT—INJURY TO PERISHABLE CARGO BY DELAY OF VOYAGE.

1. Where a vessel having on board a perishable cargo, as oranges and lemons, is compelled by bad weather and injuries received to put into a port for repairs, and the master uses all possible diligence in repairing, and takes the best care he can of the cargo, which begins to decay, he is not responsible, nor are the owners of the vessel, for the loss by such decay.
2. He is entitled to freight for so much of the cargo as is delivered, but not for that which was lost and thrown away in repairing in the port of distress.

APPEAL from the circuit court for the southern district of New York. The case is fully stated in the opinion.

*Mr. Donohue*, for appellant.

*Mr. Owen*, for appellees.

\* Mr. Justice CLIFFORD delivered the opinion of the court. [ \* 173 ]

These are appeals in admiralty from the respective decrees of the circuit court of the United States for the southern district of New York. Both of the suits were founded upon the same transaction, and depend substantially upon the same facts.

One was a suit *in rem* against the brig L. A. Collenberg, brought by the appellant, in which it was alleged that certain merchandise, consigned to the libelant, was shipped at the port of Palermo, on the twelfth day of December, 1855, on board the brig, in good order and condition, and that the master signed bills of lading, agreeing to deliver the same in like good order and condition to the libelant, at the port of New York; and the charge in the libel was, that he had failed to deliver seven hundred boxes of lemons, and two thousand one hundred and fifty boxes of oranges, constituting a large portion of the cargo.

Service of process was waived, and the claimant of the brig appeared, and by consent, entered into stipulation, both for the costs of the suit and the value of the vessel. They also made answer to the suit, denying the allegations of the libel, and averring that the merchandise mentioned in the bill of lading, except four hundred and fourteen boxes of lemons and oranges, which perished from their own inherent tendency to decay, had been duly transported and delivered to the libelant in like good order and condition as when laden on board, saving, only, the damage occasioned by the perils of the seas, and such as resulted from the natural decay of the fruit.

On the second day of July, 1856, they also filed a cross-libel against the appellant, as consignee of the cargo, to recover the freight for the transportation of the same, in which they alleged that they had fully performed the contract set forth in the bill of lading, and were entitled to have and receive of the respondent, for the freight and primage, including charges, the sum

\* of twenty-eight hundred and sixty-two dollars and forty- [ \* 174 ] seven cents.

Most or all the testimony was taken in the first suit, but the same was also used, by stipulation, in the cross-libel; and, after a full hearing, the district court dismissed the libel against the brig, and in the cross-action entered a decree in favor of the libelants for the freight, or so much of the same as was due for that portion of the cargo which had been transported and delivered. Both decrees, on appeal, were, in all things, affirmed in the circuit court; and thereupon the present appellant, who was the libelant in the first suit and the respondent in the second, appealed both cases to this court.

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The Brig Admiral Collenberg.

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It appears, from the pleadings and evidence, that, on the twelfth day of December, 1855, seven hundred boxes of lemons, and two thousand one hundred and fifty boxes of oranges, together with other merchandise not necessary to be specified, were shipped on board the brig, then lying at Palermo, and bound for New York, and that the master signed bills of lading, undertaking to transport the same to New York, and there deliver the same to the appellant, or his assigns, on payment of the stipulated freight, the dangers of the seas and the liability of the fruit to decay excepted.

According to the testimony of the master, the brig, with her cargo on board, sailed from Palermo on the sixteenth day of the same month, but, while pursuing her voyage, she encountered heavy gales; and on the second day of January following the sea broke over the forward part of the vessel, and carried away the jib-boom, the flying jib-boom, and both topmasts, and they were obliged in the emergency, to cut away the rigging, to clear the jib-boom from the vessel, and get rid of the broken spars. Both topmasts broke off about half way between the caps and the cross-bars; and they lost in the disaster the mainsail, the two topsails, the gallant-sail, and the spanker. Crippled and disabled as the vessel was, she was obviously incapable of proceeding on her voyage; and, consequently, the master found it necessary to bear away and put into

Lisbon for repairs, which was the nearest port. She [ \* 175 ] \*arrived off the bar at that port on the fifteenth of the same month, and two days later was able to come to anchor in the roadstead, about a mile from the shore. Vessels arriving at that port are obliged, as the witnesses state, to anchor in the stream, because there are no docks or piers in the harbor to which, in rough weather, they can be moored. On the following day, the master applied to the consul for a survey of the vessel, to estimate damages and cost of repairs, and the survey was ordered on the same day the application was made, but four days elapsed before the persons appointed to make the survey were able to go on board, in consequence of the storm, and the roughness of the sea.

They made their report on the twenty-second day of the same month, specifying the nature of the repairs required, and estimating the cost; and on the same day the master of the brig, after consulting with the consul upon the subject, applied to him for an examination and survey of the fruit, and it was immediately ordered. Persons experienced in the business were accordingly appointed by the consul for that purpose, and, on the thirtieth day of the same month they went on board and made the necessary examination. By their report it appears that they found the boxes containing the

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Lawrence v. Denbrens.

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fruit properly stowed in the vessel, and the place of storage properly ventilated; but, upon opening a certain number of boxes, they ascertained that some of the fruit was rotten, and other portions of it were beginning to decay. Under those circumstances, the surveyors directed that the boxes should be discharged and placed in a well-aired storehouse, until the vessel could be repaired and made ready to resume her voyage. That order was carried into effect, and on the ninth day of February following, the surveyors made a second examination of the boxes, and, finding that the measures previously recommended and adopted were insufficient to accomplish the object, they directed that the boxes should be opened, and the unsound fruit entirely separated from that which was sound and fit for use. Competent and experienced persons were accordingly designated and employed for that purpose; and the testimony shows, that in executing the order, they condemned and threw \*away as worthless an amount of the fruit equal [ \* 176 ] to four hundred and fourteen boxes. Those persons entered upon the performance of their duty on the day they were designated, and on the nineteenth day of the same month the surveyors by whom they were selected made a report, approving what they had done for the preservation of the fruit. Throughout this period the repairs upon the vessel were being executed, and, on the twenty-fifth day of the same month the surveyors appointed to examine the brig reported that the repairs were completed and that she was in a condition to prosecute her voyage. Three days afterwards the master executed a bottomry bond to raise money to defray the expenses incurred in executing the repairs and in carrying out the measures recommended for the preservation of the cargo; and, on the fourth day of March, 1856, the brig sailed for New York, but in consequence of bad weather she did not arrive at her port of destination until the twentieth day of May following. Much of the fruit repacked at the port of distress, in the meantime, had deteriorated, and some of it had become worthless; but it is not pretended that there was any fault in the stowage, or any negligence or want of care on the part of the master during that part of the voyage. On the arrival of the vessel, all of the fruit, except what had been condemned and thrown away, as before stated, was duly tendered to the consignee, but he refused to receive it, claiming that the loss and deterioration were chargeable to the misconduct of the master at the port of distress.

1. It is conceded that the injuries received by the brig on the second of January fully justified the master in bearing away and running into Lisbon as a port of distress to refit the vessel and ren-

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The Brig Admiral Collenberg.

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der her capable of continuing and prosecuting the voyage. That concession was very properly made, as the evidence is full to the point and entirely satisfactory. Fault is not imputed prior to the disaster, either to the master or owners; and it would seem that the charge could not be sustained, if made, as the evidence shows that the vessel was staunch, the cargo properly stowed, and every reasonable precaution taken to give it sufficient ventilation.

[ \* 177 ] \*None of these matters were drawn in question at the argument, but it was insisted by the appellant in the suit against the vessel, that the repairs were not executed with proper diligence, and that the discharge of that portion of the cargo in question, and the opening of the boxes and the taking out and re-packing the fruit, were improper and injudicious, and had the effect to promote and increase the inherent tendency to decay. Much testimony was taken on the first point, and in some of its aspects it is conflicting, but when considered in connection with the circumstances, as explained by the witnesses who were present and saw the difficulties which occasioned the delay, it is quite obvious that the proposition cannot be sustained. Some twenty-five or thirty other vessels put into port about the same time for the same purpose, which created an unusual demand for the labor of mechanics. According to the statements of the witnesses, the mechanics there were few in number, and not very efficient; and what added to the difficulty was, the circumstance that it was the carnival season, and consequently the mechanics refused to work during the festivals and holidays, which for a time included two or three days in the week, and on one occasion they "struck" for higher wages, and refused to work at all for several days. Among the vessels that put into the port for repairs at that time were two bound to New York, and neither of them sailed till after the brig; and all the witnesses who were on the ground, and have any knowledge of the actual circumstances, agree substantially that the repairs were made as soon as they could be in that port at that time. Witnesses, residing in New York, express the opinion that the repairs might have been executed in much less time, and their testimony undoubtedly is correct as applied to any commercial port in the United States; but the master in this case was obliged to refit his vessel in the port of distress where she was anchored, and it must be assumed that those who witnessed his conduct have the best means of judging with what fidelity he performed his duty.

2. Two vessels only were in port bound to New York, and both of those were there for the purpose of repairs, and of course [ \* 178 ] were not in a condition to bring forward the cargo of \*the



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brig. Unable, as the master was, to employ another vessel and send the cargo forward, it was certainly his duty to take all possible care to preserve it. Looking at the whole evidence, it is clear that he sought the best advice that he could obtain, and followed it faithfully; and, notwithstanding the opinion expressed by certain witnesses to the contrary, we are by no means prepared to admit that he did not pursue a judicious course to prevent the fruit from perishing. In view of all the facts and circumstances, we think the point is without merit, and it is accordingly overruled. 3. Having come to this conclusion, one or two remarks in regard to the suit brought by the owners of the vessel will be sufficient. They having established the fact that the loss and decay of the fruit were not occasioned by the fault of the master, were clearly entitled to recover for the freight on all that portion of the cargo that was duly transported and delivered. No question was made as to the amount in the circuit court, and it is not pretended that the question ought to be opened here in case the other decree should be affirmed. After a careful consideration of the evidence, we have come to the conclusion that the decision of the circuit court was correct, and the respective decrees are accordingly affirmed, with costs.

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THE CITY OF CARONDELET, Plaintiff in Error, v. THE CITY OF ST. LOUIS.

1 BLACK, 179.

MISSOURI LAND TITLES—JURISDICTION OF SUPREME COURT OVER STATE COURTS.

1. Both parties in this suit claiming title under the act of Congress of 1812, confirming titles to village lots and out-lots and commons in Missouri, and under surveys made in pursuance of that act, this court has jurisdiction over the judgments of the supreme court of Missouri in that contested question.
2. While the title vested in the claimant of private lots which could be identified by possession as to boundaries, it did not and could not vest in the town as to commons, which were vague and uncertain in their boundaries and localities, until surveyed as the act required.
3. Where such survey had been made for the village of Carondelet, and the town authorities had accepted it, and recognized and acted on it in various ways for many years, this fact, when found by a jury, must conclude the city of Carondelet in a contest for more land and a different boundary between her and the city of St. Louis.

WRIT of error to the supreme court of Missouri. The case is stated in the opinion.

*Mr. Hill and Mr. Ewing*, for plaintiff.

*Mr. Shepley and Mr. Gardentine*, for defendant.

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[ \* 187 ] \*Mr. Justice CATRON delivered the opinion of the court.

This cause is brought here by writ of error to the final decision of the supreme court of Missouri. The proceeding in the court below was according to the State practice, being by petition partly in the nature of a common-law action, and also corresponding in other parts to a bill in equity. One issue was presented by the pleadings which was submitted to a jury. The petition states, that, between the years 1796 and 1800, the northern line of the Carondelet common was surveyed and marked by Soulard, the proper Spanish surveyor for upper Louisiana, pursuant to an order made by the lieutenant governor of the province; that the line was run and duly marked in presence of certain of the inhabitants of St. Louis and Carondelet, and published at the church door. It commenced at the bluff bank of the Mississippi river, at a mound called the Sugar Loaf, about four miles south of St. Louis, and two miles north of Carondelet, and run westwardly to the northeast corner of the common-fields of Carondelet; that monuments were established at each end of the line, and a temporary fence was made of brushwood along the same; and that the inhabitants of Carondelet held and occupied as their northern boundary of the common up to said line, from 1796 until December 20th, 1803, and continued to claim to said line to the time of passing the act of June 13, 1812, by which act it is averred the petitioners took an absolute and fee simple title to the land bounded on the north by Soulard's line. This is the legal title set up, and a recovery of possession is claimed to that line.

The equity asked to be enforced against St. Louis is, that, in 1831, the surveyor general of Missouri and Illinois caused a survey to be made of the supposed commons of St. Louis, locating the southern boundary of the St. Louis common about one mile south of the

Sugar Loaf, and of Soulard's line above described; that,  
[ \* 188 ] to this line St. Louis claims title and holds \* possession as part of its common, and which survey is declared to be in fraud of the rights of the inhabitants of Carondelet, and throws a cloud over their title as confirmed by the act of 1812, and they pray to have it set aside and held for naught, because it was made by the surveyor general without any warrant or authority of law. Defense was made under the general issue.

A question has been raised whether this court has jurisdiction to re-examine the decision of the supreme court of Missouri.

The 25th section of the judiciary act provides, that where there is drawn in question the construction of any statute of the United States, and the decision is against the title set up and claimed under

the statute, the case may be re-examined in this court, and the decision reversed or affirmed.

Here, title was set up and claimed by Carondelet to a part of its common, according to a true construction of the act of 1812. The claim depends solely on this act of Congress, taken in connection with Soulard's survey; and the decision being adverse to the claim, jurisdiction exists.

Soulard run a single short line from the mound to the east side of the common-fields, and did nothing further. He may have obstructed on the claim of common appertaining to St. Louis, and so the department of public lands must have adjudged, as a different line was adopted. At that early day the land was of too little value to attract attention to this proceeding.

The act of 1812 granted to the inhabitants at the place known as Carondelet their lands used in common, for the pasturage. But the power was reserved by Congress to the executive authority to survey this common property, by including it in an out-boundary survey, reserving from the common property such portion as the government saw proper to withhold for military purposes, which was done.

A tract of some nine thousand acres was claimed by this hamlet of people lying south of the village, as commune property, with a comparatively small exception. The southern portion was wholly undefined; it was in the condition of Ceres' claim, [\* 189] investigated by this court in the case of *Ménard's Heirs v. Massey*.

Had the out-boundary line been run according to the reserved power in the act of 1812, the boundary of the common would have been established, there being no other claims to be included. Until a survey was made on the west and south, the villagers had no title to the common on which they could sue, because their grant attached to no land, nor could a court of equity establish a boundary. This court so held in the case of *West v. Cochran*, (17 How. 416.) The case is different, under the act of 1812, as to town lots and out-lots, as there stated. Such lots, and the possession of them, could be shown and identified, as matter of evidence. *Ib.* p. 416. The proposition is, of necessity, true, as respects all grants of specific tracts of land. If there be no boundary, the grant is vague, and cannot be identified, and the grantee takes nothing. The survey here was the completion of the title, although it succeeded the act of granting the land. It defined the grant.

In opposition to this doctrine, it is insisted that, by the act of 1812, a title in fee was taken, and that no public survey was neces-

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sary to give title. Such is the established doctrine of this court, as will be seen by the case of *Chouteau v. Eckhart*, and *Bissell v. Penrose*.

The first of these cases involved the St. Charles common; it had been officially and carefully surveyed, and the boundaries marked by Soulard, the Spanish surveyor. 2 How. 350. No question of boundary was involved in the controversy; and in the case of *Bissell v. Penrose*, (8 How.) there had been a private survey, which was filed with the board of commissioners, as descriptive of the land claimed, and which was held to have been reserved from location by a New Madrid certificate. It is, however, conceded, in the opinion of the court and in Mr. Justice McLean's dissenting opinion, that if no marked boundary had existed, the confirmation would have been vague, and the opposing entry valid.

This being the condition of the Carondelet common south of the village, a survey and line-marks entered into the title, and were necessary to *create* one; as to the survey, the land [ \* 190 ] \* granted must attach. To this end, Elias Rector, a deputy surveyor, in 1816 or 1817, under instructions from the surveyor general at St. Louis, made a survey of the Carondelet common, fixing the upper corner at the west bank of the Mississippi river, about a mile below and south of the Sugar Loaf Mound; thence running westwardly to the common-fields, southwardly with them so far as they extended; and then completed his survey below the village and fields. On the west and south the lines adjoined public lands, and on the east the tract was bounded by the Mississippi river. It has many lines and corners. The public lands and private claims lying north, west, and south of Rector's survey had to be connected with it, for the purpose of ascertaining the fractions in the townships lying adjoining; and for this purpose, the surveyor general, in 1834, ordered Joseph C. Brown, a deputy, to trace and remark the lines of Rector's survey, and connect them with the public lands and private claims. This was carefully done; the line marks of Rector's survey were found, and it was remarked. Under Rector's survey, thus identified by Brown's resurvey, Carondelet has claimed title, and now holds in fee a very large portion of its common lands. Its contestation has been as vigorous to uphold Rector's survey on the south as it has been to overthrow it on the north. It must be admitted, that if, when Rector was sent into the field to survey the village common, he had reported to the surveyor general that, after beginning at a certain point on the river, he had run a mile west, and made a second corner at the fields, and there broke his compass, and did noth-

ing more, that such a survey and return would have amounted to nothing. And this is all that Soulard did, acting under similar general instructions from the Spanish lieutenant governor with those given to Rector by the surveyor general. Both were directed to survey the common, and make due return of their work. No instructions were given where either should begin, or how he should proceed afterwards. The correctness of the survey was to be ascertained, and the work approved by higher authority.

It is objected that the field-notes of Rector's survey were not platted or recorded, and were found in an obscure box in \* the surveyor general's office, and that, in fact, there [\*191] never was an approved survey. Wm. Milburn, who was a clerk in the office as early as 1817, and had been surveyor general, proves this objection to be groundless. But suppose it was true; then how does the title of the plaintiffs stand? Soulard never made a survey that any authority did or could recognize, as one of the common; if Rector's be a fiction, and Brown's remarking equally void with the survey he traced, then the Carondelet common has no boundary on the north, west, or south, and stands as the village title did when the act of 1812 was passed, which was a vague claim set up by the villagers for 6,000 acres before the board of commissioners; and to which quantity Mr. Secretary Steuart ordered them to be held, but gave no directions how the land should be laid off; and the matter having been brought to the consideration of Secretary McClelland, he adjudged, and properly, that Rector's survey and Brown's remarking of it concluded the government, and bound the corporation of Carondelet to the whole extent of the survey.

This proceeding having the features of a suit in equity, and also of an action at law to ascertain the better title in one action, and the defendant having relied on the general issue to sustain the defense, offered Rector's survey in evidence, to prove the bounds of the land granted by the act of 1812. It was established as matter of fact, that the survey had been made, and the field-notes duly returned, and that Brown remarked the lines 1834. It also appeared, as matter of fact and of law, from the records of the general land office, by the decisions of the officers there, that the department administering the public lands had settled the question in regard to the regularity of Rector's survey, its due return, and approval. And the jury having found that the corporation of Carondelet had, in various modes, recognized, accepted, and held under Rector's survey, as identified by Brown in 1834, we are of the opinion that

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Hodge v. Combs.

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the State court properly rejected the claim set up by the petition, and order the judgment below to be affirmed.

Judgment of the supreme court of Missouri affirmed.

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### HODGE and others, appellants, v. COMBS.

1 Black, 192.

#### CONSTRUCTION OF POWER OF ATTORNEY.

1. "I hereby appoint James Love, of Texas, my general and special agent, to do and transact all manner of business in which I may be interested there," did not authorize Love to sell and dispose of bonds of the republic of Texas in his hands belonging to the maker of this instrument.
2. The case is still stronger when the purchaser gives no evidence of having paid any consideration for the bond.

APPEAL from the circuit court for the District of Columbia. The case was before this court and is reported in 21 How. 397, (3 Miller, 58.)

*Mr. Reverdy Johnson*, for appellants.

*Mr. Bradley*, for appellees.

[ \* 193 ] \* Mr. Justice GRIER delivered the opinion of the court.

This case was before this court at December term, 1858, and may be found reported in 21 Howard, 397. It was then remanded to the circuit court, with directions to allow the parties to amend their pleadings, and take further testimony.

The important question of the case was, whether Love had any authority to transfer the Texas bonds of Combs, and whether Hodge, who claimed them, had given value for them.

This court, in remanding the case, there say : " It appears that the plaintiff did not direct the sale or transfer of the stock in question, and that they were not disposed of on his account ; and if there had been a power of attorney containing an authority to sell, the circumstances would have imposed upon the defendant the necessity of showing there was no collusion with Love."

The defendants were thus required to establish two facts in order to support his defense : first, a sufficient power of at-  
[ \* 194 ] \* torney to Love to convey the stock ; and, secondly, payment of a *bona fide* consideration by Hodge.

Of the latter of these he has given no evidence at all ; and of the former, a paper which, as a power of attorney, may be construed to confer almost any or no power. It is brief and comprehensive, and is as follows :

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"I, Leslie Combs, do hereby constitute and appoint James Love, of Texas, my general and special agent to do and transact all manner of business in which I may be interested there, hereby ratifying and confirming the acts of my agent as fully as if done by myself.

"Witness my hand and seal, the 13th day of February, 1840.

"LESLIE COMBS. [SEAL.]"

It is clear, from the correspondence between the parties to it, that Combs, by this agency to "transact all manner of business," never supposed that he had authorized his agent to sell his property, and apply the proceeds to his own use. Nor did the agent so construe it till it became necessary to find an excuse for his abuse of his trust.

On the first trial of this case the respondent did not produce this very vague and carelessly drawn instrument as his authority for selling the stock, but relied on a blank endorsement of the payee upon the bonds. No prudent man would accept a title to property executed by an attorney in fact, under a power in such very general and equivocal terms; a man may have "a general and special agency to transact all manner of business," without necessarily including therein a power to sell. If it had appeared that this paper had been presented to the treasurer of Texas as a power of attorney to Love to transfer the stock on the books, and if a transfer had been made on the faith of its sufficiency to Hodge, who had paid a valuable and full consideration, he would have presented a case which might have called for a liberal construction of this vague and indefinite instrument. But as none of these facts appear, we are not called upon to speculate on the possible constructions this paper might be constrained to yield under other [\* 195] circumstances. It is sufficient to say, that, by the previous decision of this court, the defendant was permitted to amend his pleadings in order to prove two facts, both of which were necessary to constitute a good defense. The testimony to support one of them, to say the best of it, is doubtful, and the other is wholly without proof.

Decree of the circuit court affirmed.

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JOHN MAGWIRE, Plaintiff in Error, v. MARY L. TYLER and others.

1 Black, 195.

MISSOURI LAND TITLES.

1. Where the power of the Secretary of the Interior to set aside a survey of a Spanish grant which has been confirmed, and to order a new survey, has been passed upon

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by a judgment of the supreme court of Missouri, its construction of the powers confided to the secretary by the various acts of congress is open to review in this court.

2. The secretary has power over such surveys to set them aside and order new ones, as preliminary to issuing patents for the land so confirmed.

WRIT of error to the supreme court of Missouri. The case is stated in the opinion.

*Mr. Ewing*, for plaintiff.

*Mr. Hill* and *Mr. Stanton*, for defendants.

[ \* 198 ] \* Mr. Justice CATRON delivered the opinion of the court.

In 1794, Joseph Brazeau had granted to him, by the lieutenant governor of upper Louisiana, a tract of land, four arpents in front by twenty arpents deep, which extended in a N. N. west course, from the foot of the hill where stands the Grange de Terre, ascending to the vicinity of Stony creek, bounded on one side by the bank of the Mississippi; on the opposite side by the public domain; and on the southern side the tract was bounded by the concession to the free mulattress Esther, made in 1793.

In 1798 Brazeau sold and conveyed to Labeaume part of his concession. The deed includes four arpents, "to be taken from the foot of the hill or mound commonly called the Grange de Terre, by twenty arpents in depth, bounded by the rocky branch on the extremity opposite the said mound; reserving to myself (says Brazeau's deed) four arpents of land, to be taken at the foot of said mound, in the southern part of the aforesaid tract; selling only sixteen arpents in depth to the said Labeaume."

In 1799, Labeaume applied to the governor, and got his tract of 4 by 16 arpents enlarged, including the land conveyed to him by Brazeau, extending north to the rocky branch, calling for twenty arpents in depth. This enlarged tract the governor ordered Soulard to survey for Labeaume, and to put him into possession; which the surveyor did, in April, 1799.

Labeaume applied to have his claim confirmed by the board of commissioners, and, in 1810, it was confirmed for 356 arpents; and at the same time, acting on Brazeau's concession of 1794, the board confirmed to him his 4 by 4 arpents, adjoining Labeaume's tract on the south.

The board ordered that Labeaume's concession should

[ \* 199 ] be \*surveyed, in conformity to the order of survey made by the lieutenant governor; and that Brazeau's tract of sixteen arpents "should be surveyed, agreeably to a reserve made in a sale from Joseph Brazeau to Louis Labeaume." This survey



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was to be made conformably to the reservation in the deed, and that reservation was at the foot of the mound.

Patents were ordered to be issued to the parties respectively; but, owing to litigation before the department of public lands and in the courts of justice, between the parties claiming the reservation, and the proper mode of surveying the tract, was not settled till 1852, when the surveys were approved, and patents issued to each of the parties, locating the southern boundary of Brazeau's claim at the foot of the mound, and the opposite line, adjoining the southern boundary of Labeaume, four arpents further north, at an old ditch. Brazeau's representatives refused to accept the patent for the sixteen arpents, and caused it to be recalled at the general land office. His claim, therefore, stands before the court as it existed in 1810, when the board of commissioners confirmed it as valid.

The assignees of Brazeau brought an action of ejectment, to recover possession of 4 by 4 arpents above Labeaume's southern line, and within his survey; but this court held, that the power to survey and fix definite boundaries, and issue a patent for Brazeau's tract, was a sovereign power, reserved to the executive branch of the government, and that a court of justice had no jurisdiction to locate the claim. *West v. Cochran*, (17 How.)

The unsuccessful party then filed his bill in a State circuit court, and insists that equity can do what was declared could not be done at law, on the assumption that the court only decided in the former case that Brazeau's incipient but equitable title would not sustain an action of ejectment.

In the year 1817, "by authority of the United States and under the direction of the surveyor general for the district of Illinois and Missouri," the tract of land confirmed to Brazeau was surveyed by Joseph C. Brown, a deputy surveyor, conjointly with Labeaume's enlarged tract. The surveyor certifies that he had "surveyed for Louis Labeaume two tracts in \*one: the one [ \*200 ] confirmed in his own name for 356 arpents; the other, under Joseph Brazeau, for four arpents;" together, 360 arpents—equal to 306½ acres.

The courses and distances of the lines are given. At one of the corners the call is for a stone at the mouth of an old ditch, the lower corner of the survey on the river. The next line runs westwardly with the ditch. This survey was returned to the surveyor general's office, and duly approved shortly after it was made. It purported to include Brazeau's tract of sixteen arpents, and, of course, it was located in the southeast corner of the survey.

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When this survey was presented to the recorder of land titles to obtain a patent certificate, he refused to issue one, because both tracts were included in one survey; whereas, the recorder held that the confirmation certificates required separate surveys. Thus the matter stood till 1833, when Brown made another survey of Labeaume's tract, maintaining the ditch as the southern boundary, and throwing off on the west a surplus to reduce the tract to the quantity confirmed to Labeaume.

The representatives of Brazeau claimed to own the tract of four by four arpents north of the ditch, as indicated in Brown's survey of 1817, and a contest was carried on before the department of public lands as to the proper location of Brazeau's claim, according to his confirmation, for nearly twenty years. Finally, the secretary of the interior ordered that the tracts should be surveyed separately—set the surveys of Brown of 1817 and 1833 aside—and ordered that Brazeau's claim should be surveyed south of the ditch and next to the mound, and that Labeaume's tract should be located north of the ditch.

The representatives of Labeaume hold the land in the southeasterly corner of Brown's survey, and this is the land the bill prays may be decreed to the complainant—first, on the assumption that the confirmation certificate locates it there; and secondly, that there was no authority in the secretary of the interior department to set the survey of 1817 aside.

Labeaume's survey of 1833 was merely a reformation of the survey of 1817, excluding Brazeau's four by four arpents.

[ \* 201 ] \*In 1847 the matter as regarded these surveys was reported by the surveyor general to the general land office, where it was held that Brazeau was entitled to his four arpents square in the southeasterly part of Soulard's Spanish survey of 1799, which embraced both Labeaume's and Brazeau's tracts. This decision was overruled by Secretary Steuart in 1851, under whose order a survey was made for Brazeau outside of Labeaume's survey, as made by Brown.

This decision we are called on, in effect, to overthrow, by holding that Brazeau's land is covered by the patent to Labeaume, and the legal title vested in his representatives. And it is insisted that if it is, then a court of equity may decree that it shall be conveyed by the legal owner to him having the better equity. And this raises the question whether the secretary was authorized by law to reject the survey of 1817, order another, and overthrow Brazeau's claim of title. That the general land office has, from

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its first establishment in 1812, exercised control over surveys generally, is not open to discussion at this day.

By the act of March 3, 1807, the board of commissioners was required to deliver to each party whose claim was confirmed a certificate that he was entitled to a patent for the tract of land designated. This certificate was to be presented to the surveyor general, who proceeded to have the survey made and returned, with the certificate, to the recorder of land titles, whose duty it was to issue a patent certificate; which, being transmitted to the secretary of the treasury, entitled the party to a patent. (Act of 1807, § 6.)

This duty of the secretary of the treasury, by the act of 1812, is transferred to the commissioner of the general office.

The act of April 18, 1814, (§ 1,) requires that accurate surveys shall be made, according to the description in the certificate of confirmation, and proper returns shall be made to the commissioner of the certificate and survey, and all such other evidence as may be required by the commissioner.

These acts show that the surveys and proceedings must be, \*in regard to their correctness, within the jurisdiction [\* 202] of the commissioner; and such has been the practice. Of necessity, he must have power to adjudge the question of accuracy preliminary to the issue of a patent.

By the act of July 4, 1836, reorganizing the general land office, plenary powers are conferred on the commissioner to supervise all surveys of public lands, "and also such as relate to private claims of land and the issuing of patents."

By the act of March 3, 1849, the interior department was established. The 3d section of the act vests the secretary, in matters relating to the general land office, including the powers of supervision and appeal, with the same powers that were formerly discharged by the secretary of the treasury.

The jurisdiction to revise on the appeal was necessarily coextensive with the powers to adjudge by the commissioner. We are, therefore, of the opinion that the secretary had authority to set aside Brown's survey of Labeaume's tract, order another to be made, and to issue a patent, to Labeaume, throwing off Brazeau's claim.

A preliminary motion was made to dismiss this cause for want of jurisdiction, which was brought on with the final hearing.

The survey made by Brown in 1817 for Labeaume included both the tracts confirmed to Labeaume and Brazeau. This survey was duly approved, and so continued for fifteen years. A patent might have been issued on it, either singly to Labeaume or jointly to the

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two owners, Brazeau's sixteen arpents being granted to him in the southeast corner of the survey.

Standing on the original concession, Brazeau's tract had no specific boundary, and attached to no land; but Brown's survey identified its locality and boundary, and vested a title to land, subject to be sued for and recovered by the local laws of Missouri, and the bill was filed to assert this title, on the ground that the secretary of the interior department had no authority to set the survey aside, divest Brazeau's title, and locate the land elsewhere.

The construction of the acts of Congress, conferring power [ \* 203 ] on the secretary to do the acts \* complained of, were prominently drawn in question, and the decision below rejected the title set up by maintaining the validity of the secretary's decision.

The case falls within the principle declared in *Lytle's case*, 22 How. 202. The finding of the State court, and the decree founded on that finding, show that the question necessary to give this court jurisdiction was raised and decided. (*Craig v. Missouri*, 4 Peters, 425-6.)

Mr. Chief Justice TANEY. I think the court has not jurisdiction in this case. The only point in dispute appears to be upon the true location of the land reserved by Brazeau in his deed to La-beaume. And that question depends altogether upon the description of it in the deed, and not upon the survey made by the surveyor general of the United States, nor upon the judgment or decision of the land office. It is a judicial question, belonging exclusively to a court and jury of the State, and not embraced in any one of the provisions of the 25th section of the judiciary act of 1789, in which appellate power over a judgment of a State court is conferred upon this court. But as a majority of the court are of a contrary opinion, and have taken jurisdiction, I concur in affirming the judgment.

Mr. Justice GRIER. I concur with the Chief Justice.

Decree of the supreme court of Missouri affirmed.

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Bates v. The Illinois Central Railroad Company.

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GEORGE C. BATES, Plaintiff in Error, v. THE ILLINOIS CENTRAL RAILROAD COMPANY.

1 BLACK, 204.

RIPARIAN RIGHTS—BOUNDARIES.

1. The survey and plat by which the United States sold the land under which plaintiff claims showed the east boundary to be the lake and the south boundary the Chicago river. The plat represents the Chicago river as running about due east with the lake. In point of fact, when this survey was made this was an artificial channel. The main channel diverged southwardly and entered the lake at a different point, making a sand bar, which is the subject of the present contest. Held, that the grantee is bound by the survey and map as to the quantities specified in his patent, and acquired no claim to the sand bar in question.
2. The government of the United States has the right, through its officers, to determine the boundaries by which it sells or grants its lands, and a purchaser is bound by descriptive calls, surveys, and plats designating what he buys.
3. It was properly left to the jury to say whether, at the date of the acts under which plaintiff claims, the land in controversy was within the boundaries by which he purchased.
4. This sand bar did not exist at the date of this suit, but had been washed away, and was land under water permanently, over which defendant's railroad was carried; and the question of plaintiff's loss by this washing away of the sand bar, though much discussed, had no application, since the jury decided that he never owned it.

WRIT of error to the circuit court for the northern district of Illinois. The case is stated in the opinion.

*Mr. Wells*, for plaintiff.

*Mr. Joy* and *Mr. Noyes*, for defendant.

\* Mr. Justice CATRON delivered the opinion of the court. [ \* 206 ]

This cause comes here by writ of error to the circuit court of the United States for the northern district of Illinois. The railroad company is sued in ejectment by Kinzie's representatives for land lying under water at the city of Chicago; the end of the road running into Lake Michigan. The controversy depends on the following charge of the court to the jury:

"By the act of Congress of July 1, 1836, entries of the character of Kinzie's were confirmed, and patents were to be issued therefor, as in other cases. A patent accordingly issued to Kinzie on the 9th of March, 1837. There can be no reasonable doubt, I think, that *this title, thus perfected, related back to the entry of Kinzie in May, 1831*, and the law gave it effect from that date precisely as if it had been made in the proper land office.

"The land had been surveyed in 1821, and on the plat of the government survey the north fraction of section 10 is represented as having the Chicago river on the south, and lake Michigan

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on the east. The river is represented as flowing out in *nearly a straight line into the lake*. The fact seems to be, that from 1816 to 1821 the river, instead of flowing out, as represented on the survey, just before it entered the lake, made a sharp curve to the south, and thereby formed a sand bar or spit of land between it and the lake, which has given rise to this controversy. This sand bar existed in 1821, but it is not noticed in the plat of the survey. In 1821, the river seems to have run into the lake, according to the plat, but it is said this was in consequence of an artificial channel cut through the sand bar. This channel was stopped up in the winter of 1821-2, but was opened again in the spring of 1822 by a freshet, and water continued to flow out there in the summer of 1822; but during 1821 and 1822 more or less water passed from what had been the mouth prior to 1821. After 1822, the direct channel was stopped up, and, with an occasional exception, caused by the act of man or by a freshet, the river flowed [\* 207] \*into the lake up to 1833 in its original and natural bed. In 1833 and in 1834 the government constructed piers across the sand bar, and the river from that time has flowed through those piers; the old channel south of the pier having ceased to bear the waters to the lake, because the south pier was run across it, as well as across the sand bar. In the construction of the piers, the government of the United States did not purchase or condemn the land, but Kinzie seems to have acquiesced in the act; and, indeed, as already stated, it was not till 1836 that Kinzie's title was confirmed."

An exception was taken to the concluding part of the charge, which is as follows:

"Under this state of facts, the substantial truths of which are not denied, the land of Kinzie, covered by his entry and purchase, would be the tract within the following boundaries, as they existed at the time of the entry, (there being no question made, but that the government plats, by which sales were made, show that the whole land north of the river and south of the north line of the fraction was sold as one parcel,) and are the north line and west line of fractional section 10, according to the public survey, and the Chicago river and Lake Michigan, as they existed; that is, it would include all the dry, firm land there was at that time between the west line of the section and the lake, and the north line of the section and the river. The river, the lake, and the two lines of the fractional section 10 constituted the boundaries. Whether the land in controversy was within these boundaries is a fact to be found by the jury, depending upon the evidence before them."

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The facts as recited were not disputed; nor is any exception taken to the statement made, preceding the court's conclusion on the law and facts of the case.

The land trespassed on and sued for, as described in the plaintiff's declaration, lies south of the south pier, is now covered with water, and a part of the bottom of the lake; on which land the end of the railroad is located. It was formerly overlaid with the sand bar, which was swept away by the current the piers created. It is situated outside of fractional section ten, as its boundary was described by the judge to the jury. And this raises the question, by what rule is the public \*survey to which [ \* 208 ] the patent refers for identity to be construed? The land granted is  $102\frac{29}{100}$  acres, lying north of the Chicago river, bounded by it on the south, and by the lake on the east. The mouth of the river being found, establishes the southeast corner of the tract. The plat of the survey, and a call for the mouth of the river in the field-notes, show that the survey made in 1821 recognized the entrance of the river into the lake through the sand bar in an almost direct line easterly, disregarding the channel west of the sand bar, where the river most usually flowed before the piers were erected. It is immaterial where the most usual mouth of the river was in 1821; nor whether this northern mouth was occasional, or the flow of the water only temporary at particular times, and this flow produced to some extent by artificial means, by a cut through the bar, leaving the water to wash out an enlarged channel in seasons of freshets. The public had the option to declare the true mouth of the river, for the purposes of a survey and sale of the public land. And the court below properly left it to the jury to find whether land on which the railroad lies is within the boundary of the tract surveyed and granted. According to the judge's construction of the plat and calls, and the patent bounded on the survey, the jury was bound to find for the defendant, and therefore this ruling was conclusive of the controversy.

In regard to the matter so much and so ably discussed in the argument here, as to the rights of proprietors on the lake shore, where their fronts were swept away by currents, and to what extent they still owned the lands covered with water, undoubtedly theirs before the decrease took place, we do not feel ourselves called on to decide, because this plaintiff was not the owner of the land sued for before the decrease occurred, and could have no proprietary rights in the bottom of the lake. Before a proprietor can set up his claim to accretions and the like, he must first show that he owns the shore; and if he fail first to establish his ownership,

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judicial inquiry respecting his rights in or under the waters adjoining are abstractions and useless.

Judgment of the circuit court affirmed.

WILLIAM S. JOHNSTON, Plaintiff in Error, v. JOHN A. JONES and others.

1 Black, 210.

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RIPARIAN RIGHTS—ACCRETIONS—BILLS OF EXCEPTIONS.

1. The court comments severely on the practice of incorporating large masses of evidence, including all offered or given, and, on general exceptions, to the charge of the court.
2. In deciding whether the lot purchased by plaintiff of Johnston had a water front, the fact must be determined by the condition of the lot when the deed was made, and not by a reference to the condition of things when Kinzie made his title bond to another person, on which his deed to Johnston was founded.
3. As the lot of plaintiff had no water front when he received his deed, any instructions of the court to the jury as to the mode of dividing accretions between water lots which *have* a claim to them, can work no injury to plaintiff in error. But this court adheres to and reiterates the rule laid down in this case when formerly before it, as reported in 18 How. 150, (1 Miller, 138.) See also *Deerfield v. Arms*, 17 Pickering, 45, the language of which is here adopted.
4. A deed from Robert A. Kinzie, the patentee, to John H. Kinzie described this lot by reference to the original plat, which *did* show a water front; but the deed of John H. Kinzie to plaintiff referred to the plat *as recorded*, which did *not* show a water front. A deed made by John H. Kinzie to plaintiff long since this suit was commenced, purporting to correct a mistake by making the deed conform to the original plat, was rightfully excluded from the jury.
5. The evidence offered to show the nature of accretions by Allen's map was inadmissible, because the evidence shows that Allen's map was not the map, and was not reliable evidence.
6. This court will not interfere with the discretion of the court in refusing evidence offered in rebuttal which should have been introduced at first as evidence in chief.

WRIT of error to the circuit court for the northern district of Illinois. The case was in this court before, and is reported, with the facts little varied from those now present, in 18 How. 150, (1 Miller, 131.)

*Mr. Wills*, for plaintiff.

*Mr. Fuller* and *Mr. Carlisle*, for defendants.

[ \* 218 ] \* Mr. Justice SWAYNE delivered the opinion of the court. This case was before this court at December term, 1855. It is reported as then presented, in 13 Howard, p. 250. The judgment of the circuit court was reversed, and the cause remanded for



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further proceedings. The action below was ejectment, brought to recover a part of the land formed by accretion on the shore of Lake Michigan, north of the north pier of the harbor, in the city of Chicago. The land in controversy was claimed to belong to water lot No. 34, in Kinzie's addition to that city. The plaintiff in error sought to recover it, in virtue of his ownership of that lot. Upon the last trial, many days were consumed in submitting to the jury the parol and documentary evidence of the parties. The former was printed as the cause proceeded.

At the close of the argument, prayers for instructions to the \* jury were submitted by both parties. All the tes- [\* 219] timony given in the case, the instructions asked for by both parties, and the entire charge of the court as given, are embodied in the record. They make an aggregate exceeding four hundred and fifty printed pages. The bill of exceptions embraces all this matter. It commences with an introduction, setting forth that the whole of the printed evidence was made a part of it, and terminates with a supplement containing the exceptions taken by the plaintiff in error. Six of these exceptions are to the rulings of the court in excluding testimony. They are in this form:

"2. Also to the ruling of the court in excluding the testimony of Samuel S. Greeley, as stated on pages 133 and 134 of the printed report." The pages of the "printed report" do not agree with the pages of the printed record. The reference, therefore, affords no aid in finding the matter referred to.

The 8th exception is as follows: "Also to the charge of the court as contained on page 453, and as stated on page 462."

It is then stated that, in compliance with the rule of this court, and for the sake of greater caution, the plaintiff below "specially excepted on the trial, and the exceptions were allowed by the court," to the parts of the charge which follow.

The first part of the charge, as thus set out, contains a distinct, legal proposition. To this the plaintiff distinctly excepted. This was proper. Then follows nearly two pages containing the views and reasonings of the court, comments upon the evidence, and several legal propositions. They are followed by this exception: "To the instructions as given by the court to the jury, the plaintiff then and there excepted." Exception was also taken to the refusal of the court to give to the jury the instructions prayed for by the plaintiff.

It has been found irksome and inconvenient to the court to look through this record and find the parts that are necessary to be considered. The necessity of performing this office has imposed upon

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us a labor which would have been avoided if the bill of exceptions had been properly framed. In 2 Peters, 15, Pennock and Sellers v. Douglas, Mr. Justice Story remarked upon the irregularity, inconvenience, and expense of putting \* the entire testimony in a case into the bill of exceptions, and expressed the regret of the court that such a practice should prevail.

In 4 Howard, 297, Zeller's Lessee v. Eckert and others, Mr. Justice Nelson, in delivering the opinion of the court, said: "This mode of making up the error books is exceedingly inconvenient and embarrassing to the court, and is a departure from familiar and established practice." "Only so much of the evidence given on the trial as may be necessary to present the legal questions thus raised and noted, should be carried into the bill of exceptions. All beyond serves only to encumber and confuse the record, and to perplex and embarrass both court and counsel."

The court desires to put on record again its condemnation of this irregularity, and to express the hope that a better practice may prevail hereafter in all cases intended to be brought before this court for revision.

The 38th rule of this court, adopted at January term, 1832, directs that thereafter "the judges of the circuit and district courts do not allow any bill of exceptions which shall contain the charge of the court *at large* to the jury, in trials at common law, upon any general exception to the whole of such charge, but that the party excepting be required to state distinctly the several matters in law in such charge, to which he excepts, and that such matters of law, and those only, be inserted in the bill of exceptions, and allowed by the court."

The rule was not observed in this case. It is questionable whether the exceptions, in respect of the greater part of the charge, are so distinct and specific that this court, if the point had been made, could consider them. It is well settled, that if a series of propositions be embodied in instructions, and the instructions are excepted to in a mass, if any one of the propositions be correct, the exception must be overruled. 3 Seld. 273, Hunt v. Maghee; 2 Kernan, 313, Decker v. Matthews.

The point was not made by the defendants. We have, therefore, not thought it necessary to consider it. As it may arise hereafter in other cases, we have deemed it proper thus to call attention to the subject.

[ \* 221 ] \* The same evidence substantially was given upon this trial which was given upon the former trial, as reported in 18 Howard. It would unnecessarily encumber this opinion here

to repeat it. The only features claimed to be new by the plaintiff in error are: 1st, the title bond of Robert A. Kinzie to Gordon S. Hubbard, of June 10, 1835, for lot 34, and other property therein described. Johnston, the plaintiff, became the assignee of this bond, and under it procured his deed of October 22, 1835, from Robert A. Kinzie, for lot 34. 2d. The deed from John H. Kinzie to the plaintiff, dated July 1, 1857. This deed was offered, but not received in evidence.

The plaintiff in error relies upon the following exceptions. They will be considered as we proceed :

1. The court instructed the jury "that the controversy turned upon what the fact was, on the 22d October, 1835, as to this water front. Had lot 34 a water front *at that time* north of the north pier?"

The instruction was according to the ruling of this court, when the case was formerly here. 18 How. 157.

The counsel for the plaintiff in error insists that the deed from Robert A. Kinzie to Johnston related back to the date of the title bond from Kinzie to Hubbard, and that this was a new element in the case, which required a change of the rule, as to the point of time to which the attention of the jury should have been directed. We do not think so. The doctrine of relation cannot be made to work such a result. It is a legal fiction, invented to promote the ends of justice. It is a general rule, that it shall do no wrong to strangers. It is applied with vigor between the original parties, when justice so requires; but it is never allowed to defeat the collateral rights of third persons, lawfully acquired. 4 J. R. 234, *Jackson v. Bard*; 3 Caine's Rep. 262, *Case v. DeGoes*; 18 Vin. Abr. 287, *Relation B.*; 13 Coke, 21 *Menville's Case*; 7 Ohio S. R. 291, *Wood v. Furguson*.

The plaintiff could recover only upon a legal title. That title was vested in him, if at all, by the deed from Robert A. Kinzie of the 22d of October, 1835. The equities subsisting \*at [ \* 222 ] any time between those parties could not in anywise affect the result of the action.

We are satisfied with this instruction. Under it the jury found a verdict for the defendants.

2. It is objected that the court did not instruct the jury correctly as to the value, as evidence, of the surveys, maps, and plats exhibited by the plaintiff upon the trial; but that, on the contrary, it was stated that they were not independent evidence, and that the jury were to receive them only in so far as they were shown to be correct by the other testimony in the case.

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The facts touching these maps and plats are not stated in the bill of exceptions. We have been compelled to look over much of the testimony in our search for them. Without intending to lay down any general rule upon the subject, or to question the soundness of the authorities relied upon by the counsel for the plaintiff in error, we content ourselves with saying, that we are not satisfied that the court below committed any error in what was said in this connection.

3. It is insisted, that the court erred in laying down the rule for the partition of the alluvium. It would be sufficient to say, that the jury having found that lot 34, at the time referred to, had no water front north of the north pier, the question did not arise. The instructions given and those refused were, in this view of the subject, abstract and speculative propositions. Those given, whether right or wrong, could not have injuriously affected the plaintiff. A party cannot be allowed to complain of an error which has done him no harm. 9 Gill, 61, *Ramsey et al. v. Jenkins*.

But as the views of the court have been misapprehended, and that misapprehension may mislead in other cases, we prefer to deal with the subject as if it were properly before us. The court below instructed the jury in the language used by this court when the case was here in 1855. Upon that occasion, it was intended to adopt the rule laid down by the supreme court of Massachusetts in 17

Pickering, 45, 46, *Deerfield v. Arms*. That court said: [ \* 223 ] "The rule is: 1, to measure the \*whole extent of the ancient bank or line of the river, and compute how many rods, yards, or feet each riparian proprietor owned on the river line; 2, the next step is, supposing the former line, for instance, to amount to 200 rods, to divide the newly formed bank or river line into 200 equal parts, and appropriate to each proprietor as many portions of this *new* river line as he owned rods on the *old*. When, to complete the division, lines are to be drawn from the points at which the proprietors respectively bounded on the *old*, to the points thus determined, as the points of division on the newly formed shore. The new lines thus formed, it is obvious, will be either parallel, or divergent, or convergent, according as the *new* shore line of the river equals, or exceeds, or falls short of the *old*." It is further said: "It may require modification, perhaps, under particular circumstances. For instance, in applying the rule to the ancient margin of the river, to ascertain the extent of each proprietor's title on that margin, the *general* line ought to be taken, and not the actual length of the line on that margin, if it happens to be elongated by deep indentations or sharp projections. In such

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case, it should be reduced by an equitable and judicious estimate to the general available line of the land upon the river."

To this rule we adhere. With the qualification stated, it may be considered as embodying the views of this court upon the subject. In this case, if lot 34 had been found to have had a water front north of the north pier at the time stated, the pier front would have had nothing to do with the partition to be made. The lake front, where the accretion occurred, only could have been regarded. The whole of *that front* should have been taken as the basis of the adjustment.

4. The court refused to instruct the jury as prayed upon the subject of the possession of the alluvium in controversy by the plaintiff in error. It is sufficient to say, that both the prayers upon that subject assume as an element, that lot 34 had, to some extent, a front on the lake north of the north pier. The verdict of the jury, for the purposes of this case, is conclusive upon that subject. It is frankly admitted by the counsel for \* the plain- [ \* 224 ] tiff in error, that if the lot had no such front, his propositions had no application to the case.

5. The court rejected the deed of John H. Kinzie to the plaintiff, when offered in evidence.

Robert A. Kinzie was the patentee of the land upon which his addition to the town of Chicago was laid out. He conveyed lot 34 to John H. Kinzie by a deed which, in describing the lot, referred to the *original plat* of the addition. John H. Kinzie conveyed the lot back to Robert by a deed describing it, with a reference to the plat *as recorded*. The original plat showed a water front to this lot. On the plat as recorded, this fact was wanting. The deed from John H. Kinzie to Johnston was executed for the consideration of twenty-five dollars, to correct the alleged error in the deed from John H. to Robert A. Kinzie, in pursuance of a covenant for further assurance in the deed of Robert A. Kinzie to Johnston, and thus to give the plaintiff a title to the alluvium claimed to belong to that lot, if he had not such title already.

If there were any mistake in the original deeds, of which Johnston had a right to avail himself, the remedy should have been sought by a proceeding in chancery had for that purpose, with all the proper parties before the court. The agreement of the parties themselves that there was such error, and a deed made in pursuance of that agreement, cannot affect the rights of third persons. A further and fatal objection to the admission of the deed in evidence is the time at which it was executed. It bears date more than seven years after the filing of the declaration in this case. In ejectment,

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the plaintiff must recover, if at all, upon the state of his title as it subsisted at the commencement of the suit. Evidence of any after acquired title is wholly inadmissible. 4 Term R. 680, *Goodlitle v. Herbert*; 11 Illinois, 547, *Wood v. Martin*; 13 Illinois, 251, *Pilkin v. Yaw*; 8 Pet. 218, *Binney v. The Canal Co.*

6. "The ruling of the court, in excluding the testimony of Samuel S. Greeley, as stated on pages 133 and 134 of the printed report."

This, we suppose, refers to the following passage in the [ \* 225 ] \* testimony of this witness, as it appears in the printed record :

"2. (Presenting Allen's map of 1838.) Look at the accretion at the north side of the north pier, and tell me whether the ratio of increase between what is represented there in '34 and '37, and what was made from '37 to '38, call for any accretions made in '34 and '35; and if so, to what extent and in what year? "

The facts disclosed in the testimony show that Allen's map was not itself original and reliable evidence. A calculation founded upon it was therefore clearly inadmissible. The admissibility of this evidence, as regards other objections, would depend upon a proper foundation being laid for it. As it is not necessary, we have not gone into any inquiry upon that subject.

7th. "The ruling of the court, in excluding the testimony of Captain J. D. Webster, as shown on page 191 of the printed report."

It appears, in the testimony of this witness, that he went to Chicago, in 1841 or 1842, as an officer of the United States. The following also appears :

"Question. Did you hold the position of superintendent of harbors here—the same that Captain Allen did once?

"Answer. Yes, sir, I did, for a while.

"Question. State whether it was any part of your duty, as superintendent of the harbor, to report to the government the changes that were occurring in and about the harbor? "

The latter question was objected to, and the objection sustained.

The testimony which the question objected to sought to elicit would, in itself, have been immaterial and irrelevant. If intended, as part of the evidence proposed to be drawn out, to prove the duties of Lieutenant Allen at a former period, as the language of the court, in deciding the point, seems to imply, it was inadmissible also upon that ground. The official duties of Lieutenant Allen could not be proved in that way.

8th. "The rulings of the court, in excluding evidence tending

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to affect the credibility of one of defendant's witnesses, \*viz., Benjamin Jones, as stated on pages 360 and 362 of [ \* 226 ] the printed record."

The witness Jones was the brother of the defendant Jones, and had been examined in chief for him. In his cross-examination, he stated that his brother formerly owned lot 35, adjoining lot 34 ; that it had been sold at sheriff's sale ; bought in by Dennison ; by Dennison conveyed to him, and afterwards by him back to his brother.

He was asked : " Did you pay Dennison anything ? "

This question was objected to by the defendants, and overruled by the court.

We estimate at its highest value " the power of cross-examination. " The extent to which it may be carried, touching the merits of the case, was defined by this court in 14 Peters, 445 ; The Philadelphia and T. R. R. Co. v. Simpson. The rule there laid down, this court has since adhered to. A cross-examination for other purposes must necessarily be guided and limited by the discretion of the court trying the cause. The exercise of this discretion by a circuit court cannot be made the subject of review by this court. We have looked through the long and searching cross-examination to which this witness was subjected. There would have been no error if the objection had been overruled. There was none in sustaining it.

9. " The ruling of the court, in excluding the evidence of Theophilus Greenwood, offered by the plaintiff, as rebutting evidence to the evidence of possession of the alleged accretion by defendants, at the date of the deed to the plaintiff, as stated on page 424 of the printed report. "

Upon looking through the testimony of the witness, we find he was allowed to testify fully upon the subject of possession. The court expressly held, that he should be permitted to do so. The plaintiff in error then proposed to prove by him where, at a certain time, " the actual water line east of or upon water lot 34 was, in reference to the east line of said lot 34 ; " \* \* " which the court refused, on the ground that it should have been introduced as evidence in chief, not as rebutting. " That this evidence was of the former and not of the latter character, seems to us too clear to admit of discussion.

\* " The mode of conducting trials, the order of intro- [ \* 227 ] ducing evidence, and the times when it shall be introduced, are matters properly belonging to the practice of the circuit courts,

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with which this court ought not to interfere." 14 Peters, 448, P. and T. R. R. Co. v. Simpson.

These are substantially all the points pressed upon our attention by the counsel for the plaintiff in error, in his able and elaborate argument. They are all to which we deem it necessary to advert.

We find no error in the record. The judgment below must be affirmed, with costs.

Decree of the circuit court affirmed.

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THE UNITED STATES, Appellants, v. KNIGHT'S ADMINISTRATOR.

1 Black, 227.

CALIFORNIA LAND GRANTS.

1. The court in this case makes a lengthy and close examination of the evidence, from which it comes to the conclusion that the papers offered are forgeries, and that no grant was ever made to claimant's intestate.
2. The absence of any record evidence of the grant, or of the loss of records in which it ever existed, held to be fatal to the claim.

APPEAL from the decree of the district court for the northern district of California. The facts of the case are stated in the opinion.

*Mr. Schenck* and *Mr. Black*, for the United States.

*Mr. Stanton* and *Mr. Sunderland*, for appellee.

[ \* 241 ] \* Mr. Justice CLIFFORD delivered the opinion of the court.

That was a petition for the confirmation of a land claim under the act of the third of March, 1851, and the case comes before the court on appeal from a decree of the district court of the United States for the northern district of California, reversing the decree of the commissioners, and confirming the claim. William Knight died in October, 1849, and, of course, never presented any claim under that law for confirmation. Administration on his estate was granted to the appellee on the 6th day of November, 1851, and, on the third day of March following, he, as such administrator, filed a petition before the commissioners, claiming a tract of land, called Carmel, situated on the borders of the Sacramento river, and containing ten square leagues. Said tract, as the petitioner represented, was granted to his intestate on the fourth day of May, 1846, by Governor Pio Pico, in the name of the Mexican nation; and was afterwards, during the lifetime of the decedent, possessed and occupied by him pursuant to the grant under which the claim is made.



Copies of certain documentary evidences of title were also presented and filed at the same time, and the petitioner represented in effect that he relied on those documents, and such other evidence as he might be able to obtain, to show that the claim \*ought [ \* 242 ] to be confirmed. Assuming that the theory of claimant is correct, the title is one, undoubtedly, that ought to be protected; but it is denied by the United States that any such grant was ever made, and that is the principal question in the case. Vacant lands in California belonged to the supreme government, and the laws for the disposition of the same emanated from that source. General rules and regulations upon the subject were accordingly ordained, authorizing the governors of territories, under certain specified conditions, to grant such lands to such empresarios, families, and single persons as might ask for the same for the purpose of settlement and cultivation; but it was expressly provided that grants made to families or single persons should not be held to be definitively valid, without the previous consent of the territorial deputation. By those rules and regulations, every person soliciting such lands was required, in the first place, to address a petition to the governor setting forth his name, country, profession, and religion, and also to describe the land asked for as distinctly as possible, by means of a *diseño* or map, which is usually annexed to the petition. He was not required to prove his representations, but it was made the duty of the governor to obtain the necessary information to enable him to determine whether the case, as presented in the petition, fell within the conditions specified in the regulations, both as regarded the land and the applicant. Petitions and grants, with the maps of the land granted, were required to be recorded in a book kept for that purpose, and a circumstantial account of the adjudications was directed to be forwarded quarterly to the supreme government. To bring the claim within these rules, the claimant introduced the following documents before the commissioners:

1. A petition, in the usual form, signed by his intestate, bearing date at Sonoma, on the first day of February, 1846, and addressed to Governor Pio Pico.

Recurring to the material parts of the instrument, it will be seen, that the petitioner asked the governor to grant him "the tract set out in the annexed map," meaning the map annexed to the petition, containing ten sitios de *gañada* mayor, more \*or [ \* 243 ] less, and after describing the tract, and giving the out-boundaries of the same, stated that, according to the annexed report of the magistrate of Sonoma, "there seems to be no obstacle on the part of any one to its concession." No such map, however, as that

referred to was annexed to the petition at the time it was introduced ; and the expediente contained no report of the alcalde of Sonoma, or of any other such magistrate.

2. Two decrees, signed by Governor Pio Pico, both dated Angeles, May 4th, 1846, were also introduced by the claimant. One was written, as usual, in the margin of the petition, and was as follows: "Granted as prayed by the petitioner. Let the title be issued by the secretary of the department." But the other, which is signed also by the secretary, was appended to the petition, without any intervening *informé*, or order for the same ; and yet the recitals of the decree plainly import that the action of the governor, in making it, was based not only upon the petition, but also upon a report of the alcalde of the district, as set forth in the petition. Like the preceding decree, it directs that a proper title be issued to the petitioner ; and, also, that the expediente be kept, to be submitted to the departmental assembly.

He also introduced another document, which was appended to the last named decree, and which purports to be a copy of the "titulo" or grant on which the claim is based. It is dated at the city of Los Angeles, on the fourth day of May, 1846, and is in the usual form.

Failing to produce the original grant, the administrator introduced his own affidavit, to show that he had made diligent search for the same among the papers of the deceased, and elsewhere, and that he was unable to find it. Three witnesses were examined by the claimant before the commissioners ; but the commissioners rejected the claim, and the claimant appealed to the district court. Testimony was taken on both sides in the district court, and the claimant also introduced certain additional documentary evidences which it becomes important to notice.

[ \* 244 ] \* Nearly three years before the petition was presented to Governor Pio Pico, the same party, as appears by these documents, had presented a similar petition to Manuel Micheltona, then holding the office of governor of California, asking for a grant of the same tract of land. This petition, as then presented, was dated at Monterey on the eighth day of May, 1843, and on the same day the governor referred it to the prefect of the district for a report. John A. Sutter was at that time the principal civil officer in that section of the department, and the prefect accordingly referred the petition to him, directing him to furnish the necessary information ; but he referred it to the alcalde or justice of the peace of Sonoma, for the reason, as stated, that the land was in that district. On the twenty-sixth day of January, 1844,

the last-named officer reported, to the effect that the land solicited was occupied by virtue of a concession from the governor in favor of another individual.

That report was duly transmitted to the governor; and, on the twenty-seventh day of March following, he referred the whole case to Manuel Jimeno, who, on the same day, made a report, recommending that the petition in question, and all similar cases, should be suspended until the governor could visit that frontier. Here the matter dropped; and, for reasons which will presently appear, the petition was never again considered.

Certain prominent persons belonging to the department, of whom Pio Pico was one, in the fall of 1844, revolted against the authority of Micheltorena; but John A. Sutter supported the constitutional governor, and was sent by him to collect the militia of the northern frontier, to put down the rebellion. Some of the adherents of the latter had certain claims to lands, and he suggested to the governor, in the emergency, that grants should be made to them, probably as the most available means to secure their services. Pursuant to that suggestion, the governor sent to that officer the document known as the "Sutter general title," promising grants to all such claimants as had previously obtained from him a favorable report. According to the testimony of Sutter, the claimant's intestate was properly \*included in that category; and he [ \* 245 ] accordingly, on the fifteenth day of April, 1845, gave him the copy of that document, which is exhibited in this record.

Such is the substance of the documentary evidences of title introduced by the claimant. All those relating to the proceedings on the petition presented to Micheltorena, together with the copy of the Sutter general title, were found among the papers of the deceased; but those appertaining to the Pio Pico expediente, except the alleged copy of the grant, are traced copies of originals, now on file in the office of the surveyor general of California.

It is not pretended that the Sutter general title has any validity, or that the claim in this case can be upheld by the proceedings that took place on the first named petition. Such pretensions, if made, could not be supported, as this court has determined, on several occasions, that the former was invalid; and it is quite obvious that nothing was done by Governor Micheltorena to give any pretense of title whatever to the claimant's intestate.

But it is insisted that the parol proofs, taken in connection with the expediente of 1846, clearly show that Pio Pico, on the fourth day of May in that year, actually issued the grant to William Knight; and that, having proved its execution, delivery, and loss,

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the claimant is entitled to introduce secondary evidence, to show its contents. Great reliance is placed upon the *espediente*, as furnishing a ground of presumption that the grant was issued; and, indeed, it is contended, that if it appears that the *espediente* is genuine, then the grant must be confirmed. Whether the proposition, as stated, be correct or not, it may properly be admitted that the question, as to the *bona fides* of the *espediente*, is one of very considerable importance in the case. When complete, an *espediente* usually consists of the petition, with the *diseño* annexed; a marginal decree, approving the petition; the order of reference to the proper officer, for information; the report of that officer, in conformity to the order, the decree of concession, and the copy or a duplicate of the grant. These several papers—that is, the petition, with the *diseño* annexed, the order of reference, the [ \* 246 ] \**informé*, the decree of concession, and the copy of the grant, appended together in the order mentioned—constitute a complete *espediente*, within the meaning of the Mexican law.

Three defects are obvious in the document exhibited in the record. There is no map annexed to the petition, and there is neither an order of reference nor an *informé*; and the inference from the fact that the decree of concession immediately follows the petition is a reasonable one, that no order of reference or report were ever made.

Those defects, however, are by no means the principal circumstances that tend to create distrust as to its genuineness. Much graver difficulties than any suggested by the defects of the document arise, from what appears affirmatively, on its face. Both the petition and the decree of concession refer to the report of the *alcalde* of Sonoma; and the language of the latter plainly imports that it was founded, in part at least, upon a report of that magistrate. No such report, so far as appears, was made by that officer, in connection with the *espediente* under consideration. He never made but one report, and that, as clearly appears, was adverse to the application, and was made to Micheltorena on the twenty-sixth day of January, 1844, in which he stated that the land solicited was occupied by virtue of a concession from the governor in favor of another individual.

Looking at the terms of the report, it is clear that it is not to that report, as originally framed, that reference is made, either in the petition or the decree of concession. On the contrary, it is evident that they both refer to a *favorable* report, and not to one that was *adverse*, which entirely negatives the theory that the *informé* previously made and on file was carried into this *espediente*. To

suppose that the governor referred to an *informé* that never had any existence, is a theory that cannot be adopted, as it would impute to him an inconsistency little better than a fraud upon the government. Some other theory, therefore, must be adopted, to explain the transaction. Referring to the record, it appears that Jacob P. Leese was the *alcalde* who made that report, and he was examined as a witness in behalf of the United States. He testified that \* the words *una parte de ello*, translated, a part of it, now [ \* 247 ] appearing at the close of the report, were inserted by him on the eighth day of October, 1847, at the solicitation of the claimant's intestate. That alteration in the *informé* was made, as he states, in the presence of the individual who, according to his original report, was in the occupation of the land by virtue of a concession from the governor. Two certificates were also introduced by the claimant, which go very far to confirm the statements of the witness, both as to the time when the addition was made to the *informé*, and the attending circumstances. One of those certificates is signed by the witness himself, in which, after referring to the *informé*, he states, in effect, that he has discovered, since he made that report, that the statement therein made, that the land was occupied by another individual, was erroneous ; and the other certificate is signed by the person referred to in the *informé* as the occupant of the land ; and he certifies that the land solicited, if " regulated to the plan," would not interfere with his possession. These certificates bear date on the eighth day of October, 1847, and the witness testifies that he made the alteration in the *informé* at the time he gave that certificate. Micheltorena was driven from power in 1845, and on the tenth day of August, 1846, Pio Pico fled from the city of Los Angeles, and never afterwards had possession of the archives or records of the department. Before his flight, he placed them in boxes, and deposited them with Luis Vignes for safe-keeping. On the thirteenth of that month, Commodore Stockton entered the city of Los Angeles, and on the next day Colonel Fremont took possession of the archives, and kept them until the eighth day of September following, and then took them to Sutter's fort, on the American river, where they remained until 1847, when they were sent to Monterey. They remained at Monterey until February, 1850, when they were sent to Benicia, and thence to the office of the surveyor general. Whatever might have been the motive for making the alteration in the *informé*, it is clear that it could not have been done to influence the official action of the governor, for he had long before gone out of office ; and yet the circumstances strongly support the hypothesis that it was to \* that [ \* 248 ]

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same report, as altered on the eighth day of October, 1847, that the reference is made, both in the petition and the degree of concession embraced in the *espediente*. Assuming that to be so, then it is clear that the *espediente* is ante-dated and fraudulent, and the circumstances, when taken together, tend so strongly in that direction, that we think the *espediente* is not entitled to much weight. When the jurisdiction of that department was transferred to the United States, the motive to fabricate titles to real property became strong and active, and the evidence in this case is abundantly sufficient to show that opportunities occurred to enable the unscrupulous to foist simulated evidences of such titles into the depositories of the archives, after they were seized at Los Angeles, in spite of any vigilance that those intrusted with their safe-keeping could possibly employ to preserve them from such fraudulent practices. Interested parties were necessarily allowed to consult the contents of the packages while they yet remained in very considerable disorder, and without any permanent custodian. Among those who had such opportunities was one of the witnesses of the claimant, and the evidence tends to show that he had an interest in the claim, and that he had stated that when he took hold of it there were no papers in the case, but that he had procured a set as good as any that could be found in the State. True it is that he denies ever having made that statement; but he admits that he went to Benicia in 1850, and that he examined the archives for the purpose of ascertaining whether any grant had been made to the claimant's intestate. He says he saw papers there with the name of William Knight on them, but neither he nor the clerks in charge of them could translate them. Whether the *espediente* in this case was in the boxes that fell into the possession of Colonel Fremont at Los Angeles, or was among the loose papers subsequently found in the custom-house at Monterey, or when or by what means the *espediente* was deposited in the archives, does not appear, except that it was there in 1847, or the first part of the year 1848, when an officer of the United States, in charge of the archives, made and completed an index of certain *espedientes*, not previously indexed, numbered, or filed, by Mexican [ \* 249 ] \*authority. Sixty-seven, including all those found in the custom house at Monterey, were then added to the previous list. Mexican numbering stopped at five hundred and twelve, and the author of the new index commenced to number where the other closed. That index includes the *espediente* in this case as number five hundred and fifty, and it shows that the *espediente* was in the archives when that index was made; but it shows

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nothing more, and cannot in any sense be regarded as a Mexican record. Evidence to show that the grant was recorded is entirely wanting; and there is no pretense that the espediente was ever submitted to the departmental assembly for its approval. Absence of such approval, under the circumstances of this case, is entitled to very considerable weight. More than forty espedientes were presented to that assembly on the third and tenth days of June, 1846, and received its approval. Several of the grants were dated in April, 1846, and one was dated on the first day of May of that year, and the inference is a reasonable one, that if the espediente in this case had really been completed, and the grant actually issued, the former would have been included in that list. Taken together, these various considerations throw great distrust upon this document, and justify the conclusion that it is entitled to little or no weight. Rejecting the espediente as unsatisfactory and wholly insufficient, under the circumstances, nothing remains to support the claim in this case except the parol proof. Claimant's theory is, that the grant was issued by Governor Pio Pico at Los Angeles on the fourth day of May, 1846, and was then and there delivered to his intestate. At that time William Knight lived in the valley of the Sacramento, some seven hundred miles distant from the seat of government, where it is assumed that the grant was issued; but it is insisted that he visited that place the last of April or early in May of that year, and that the grant was delivered to him in person by the secretary of the department. José M. Moreno was the secretary at that time, and he testifies that the grant was issued by the governor on that day, and that he, the secretary, delivered the same to the claimant's intestate. But it is a sufficient answer to the testimony of that witness to say, that it is \*conceded by the claimant, that his character for [ \* 250 ] truth is worthless.

Another witness, James M. Harbin, testifies, that he saw William Knight in Los Angeles about that time, and that he said he was there for the purpose of getting a grant for ten leagues of land on the Sacramento river; that Governor Pio Pico told him that he had issued the grant, and that he, the witness, saw papers in the possession of Knight when he started to return, but did not know what they were. Proof was also introduced by the claimant to show that the signatures to the marginal decree and the decree of concession were genuine; and he also introduced an affidavit of J. C. Davis, in which the affiant states that, on the 5th day of June, 1846, he heard Knight say, in the camp of Colonel Fremont, that he had just returned from the lower country, where he had pro

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cured his title papers; and the affiant also stated that he exhibited certain papers, calling them title papers, but the witness did not examine them, because he could not read the language. Other declarations of Knight were also introduced without objection—such as, that he, at one time, said he was going to Los Angeles, concerning the title to his land, and that, on his return, he said he had received it; and that, in March, 1847, he said he had lost his grant, and expressed his fears that he should lose his land in consequence of the loss of the grant. It was denied by the United States that he made any such visit to Los Angeles as is alleged; and they also insisted that he never claimed to have any other title to the land than the copy of the general title, which was furnished him on the fifteenth day of April, 1845; and a large number of witnesses were examined to establish these points. They prove that, whenever he spoke of having a title to the land, he uniformly spoke either in vague terms, or else referred directly to the general title, and never, in a single instance, declared that he had a grant of the land from the last-named governor. They also prove that he was at home during the winter and spring of that year, and that in the month of April he was engaged, to some extent, in agricultural pursuits. One witness states, that he saw him [ \* 251 ] on his ranch about the eighteenth or \*twentieth of that month; and another, that he saw him at his house about the first of May of the same year, and states the circumstances that enable him to fix the time with certainty. Two other witnesses, one a boarder in his house, and the other a neighbor, state, with great positiveness, that he was at home in the early part of May, sometimes hunting and sometimes farming, until he joined Colonel Fremont on the twenty-sixth day of that month. Testimony was also introduced by the United States, showing that great difficulties would have attended such a journey at that season of the year, on account of the swollen state of the streams and the condition of the roads; and some of the witnesses, who were well acquainted with the usual route, express the opinion that the journey, in the ordinary course of traveling, could not have been accomplished short of a month. These and many other facts were given in evidence to show that he did not visit Los Angeles at the time alleged; and clearly the weight of the evidence, to say nothing of the improbability that the governor would bestow such a bounty upon one so recently in arms against him, is clearly against the theory set up by the claimant. Suppose it were competent for the appellee to prove his claim without record evidence, still the burden is upon him to show that the grant was issued; and surely he must first show its exist-



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ence and loss before he can be allowed to give secondary evidence of its contents. Applying that elementary rule to the facts of this case, and it is clear that the claimant has no standing in court. But a more decisive answer to the claim remains to be stated, and that is, that there is no record evidence that the grant was ever issued, and without such evidence the claim cannot be confirmed. That rule is founded upon the Mexican law, and has been so repeatedly announced by this court that it seems unnecessary to adduce any argument in its support. To maintain a title by secondary evidence, say the court, in *United States v. Castro et al.*, (24 How. 350,) the claimant must show that the grant was obtained and made in the manner the law required, at some former time, and that it was recorded in the proper public office; to which it may be added, that such was undoubtedly the Mexican law, and that the rule \*there laid down is plainly applicable to the present [ \* 252 ] case. Similar views have been expressed by this court on so many occasions that it would be a work of supererogation to do more than to refer to the decided cases. *United States v. Teschmaker*, (22 How. 392;) *United States v. Fuentes*, (22 How. 443;) *United States v. Cambuston*, (20 How. 59;) *United States v. Osio*, (23 How. 279, 280.)

Evidence was also introduced by the claimant tending to prove that a book of records appertaining to land titles in California, for the year 1846, was lost; but no attempt was made to show that the grant in question was ever recorded in that book. All we think it necessary to say upon that subject at the present time is, that proof of such a loss cannot avail a party in a case like the present, unless it also be shown, at least by circumstances which will justify the court in finding the fact, that the grant was duly and properly entered in the lost record. In view of the whole case, we are of the opinion that the district court erred in confirming the claim. The decree must accordingly be reversed, and the cause remanded, with directions to dismiss the petition.

Mr. Justice WAYNE. I content myself now with saying that I do not concur with the court in its conclusion in this case. I think it a severer exclusion of a right of property in land secured by treaty than has been hitherto adjudged by this court in any case from California.

Decree of the circuit court reversed and cause remanded, with directions to dismiss the petition.

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Rogers v. Law's Executors.

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LLOYD N. ROGERS and others, Appellants, v. LAW'S EXECUTORS.

1 Black, 253.

WILLS, LEGACIES, &c.

1. The lapse of thirty years, without evidence of a claim for money loaned a decedent, with failure to present it as a claim against his estate, are sufficient, in the absence of satisfactory evidence, to justify the rejection of the claim.
2. Where, in an ante-nuptial agreement, the husband covenants with the trustees to secure to his intended wife a sum equal to that which his wife has from her father's estate, when this shall be realized and ascertained, the husband's estate is not liable on this covenant after his death, unless it is shown what was realized and received by the trustees for the wife from her father's estate, and this in money, and not by a valuation or appraisement of property.
3. A condition to a bequest that it shall be forfeited if the devisee sets up any other claim against the estate of the testator, is a lawful and valid condition; and it is broken when the devisee brings a suit, under other deeds or instruments, against the estate, though defeated in that suit.

APPEAL from the circuit court for the District of Columbia. The subject-matter of this suit was before this court, and is reported as *Adams et al. v. Law*, 17 How. 417, (21 Curtis, 584.) The case as it now stands is stated in the opinion.

*Mr. Mason Campbell*, for appellants.

*Mr. May* and *Mr. Brent*, for appellee.

[ \* 256 ] \* Mr. Justice NELSON delivered the opinion of the court.  
This is an appeal from a decree of the circuit court of the United States for the District of Columbia.

The appeal is from a decree of the court below, entered there upon the going down of the mandate of this court, in pursuance of its decision when the case was formerly here, on an appeal by the executor and trustee of the estate of Thomas Law, the settlement of which is the subject of litigation.

The case is reported in the 17 How. 417. This court reversed so much of the decree in the court below as gave to the grandchildren of the testator by Eliza, his daughter, wife of Lloyd N. Rogers, an interest, under certain limitations, in the deed of marriage settlement of the 19th March, 1796, amounting to the sum of [ \* 257 ] \$66,154.81, and affirmed the residue of said \* decree.

This sum, by the decision, fell, of course, into the residuum of the estate of Law, for distribution among the creditors, legatees, and distributees.

When the case came again before the auditor appointed by the court below, several claims were presented for allowance, which

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were heard and examined by him, and his decision thereon reported to the court; and, after exceptions and argument, the report was confirmed. These several claims are now the subject of review by this court, upon the present appeal.

The first is a claim by Lloyd N. Rogers, as a creditor of the estate, and is founded upon an alleged loan of money to the testator, Law, as early as 1822. This claim was rejected by the auditor, upon the ground the proofs were not satisfactory that the loan had ever been made by Rogers. The lapse of time, also, since it was alleged to have been made, some thirty-three years, without, for aught that appears, presenting it to the testator in his lifetime, or against the estate since his death, strongly confirms the conclusion of the auditor. We think the item was properly rejected.

The next claim is also by Lloyd N. Rogers, as a creditor of the estate, and is founded upon a deed executed by Thomas Law, the testator, and Eliza Parke Law, his wife, on the 9th August, 1804, to George Calvert and Thomas Peter. The deed conveys to the grantees all the right and interest, real or personal, of Eliza P., the wife, and of Thomas Law, the husband, in right of his wife, to which she might or would be entitled from the estate of George Washington, or from the estate of her father, John Parke Custis, in trust, to convert the same into money, &c., &c., and to apply the interest or income of \$10,000 to the sole use of the said Eliza P. during her lifetime. This sum was also made subject to her absolute disposition by will, or in case of dying intestate, to be conveyed to her heirs; and, after deducting the \$10,000 from the fund, to apply the rents, issues, and profits of the residue to the sole use and benefit of the said Eliza P., for and during her life, and, after her death, to pay the said income to Thomas Law, the husband, (if then living,) for and during his life; and after the death of both, then to convey the whole of the residue to \*Eliza, [ \* 258 ] the daughter. And then comes the covenant of Thomas Law, which constitutes the ground of the present claim. The said Thomas covenants, to and with the trustees, that whensoever the full amount and value of the funds shall be ascertained and known, which may or shall come to their (the trustees') hands, in virtue of this trust, and it can be thereby ascertained what sum shall be secured, to come ultimately therefrom to his said daughter, Eliza, after the death of her father and mother, *that he will immediately thereupon secure to his said daughter a like sum, to be paid to her out of his estate at the death of her said father and mother.*

It will be seen by this deed that it was made the duty of the trustees, as soon as practicable, and without sacrifice of the interest

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of Mrs. Law in the estates of George Washington, and her father, John Parke Custis, to convert the property into money, and invest the same in stock or other securities; and, after setting apart the sum of \$10,000, assigned to her absolutely, the income of the residue was to be applied to her for life, and, after her death, to the husband, if he survived, for life; and, at his death, the whole, principal and interest, to be transferred to Eliza, the daughter. And it was this residue, thus ultimately to be transferred to her, which, when ascertained and known, the father covenanted immediately thereupon to secure to her a like sum, to be paid out of his estate at the death of both parents. The conversion of the residue of the estate thus limited, and ascertainment of the amount of it in money or stocks or other securities, as prescribed in the deed, are, by the very terms of the covenant, a condition precedent to the obligation of the father to secure a like sum to the daughter. An appraisal or valuation of this residue of Mrs. Law's interest in the two estates will not answer the condition. The amount must be ascertained by a conversion of the property into money, or its equivalent. This is not only the fair meaning of the terms of the covenant, but the obvious intent of the parties in the connection in which it is found.

This being, in our view, the true construction of the covenant, it is only necessary to say, that there was no evidence before the auditor that its condition had been complied with, [ \* 259 ] \*either in the lifetime of the testator or since his death.

We are of opinion, therefore, that the claim was properly rejected. -

The third claim arises upon a codicil to the will of the testator, Thomas Law, which bequeaths to the three grandchildren, the children of his daughter Eliza by Lloyd N. Rogers, \$8,000 each, upon this express condition, that if the grandchildren, as heirs or devisees of their late grandmother, Mrs. Law, shall claim or demand, &c., any portion of his estate, rights, or credits, under or by virtue of certain indentures in the said codicil specially enumerated, then, and in that case, the bequest in the codicil to be null and void.

The other legatees under the will of the testator object to the allowance of these three legacies, for the reason that the condition upon which they were to become null and void has happened, namely, a claim against the estate of the testator as heirs or representatives of their grandmother, Mrs. Law. The auditor, after stating the facts of the case as presented to him, and the question

of law arising out of them, referred it to the court below for their direction.

The court held, that the sum of \$32,585.76, which had been awarded to Lloyd N. Rogers, as administrator of Eliza, his wife, and which was claimed and allowed under one of the interdicted deeds, and which belonged to her children, as distributees, if claimed, or received by them, would be inconsistent with their right to the legacies according to the condition of the bequest, and by the decree gave the choice to the legatees to take the legacies under the will, or the distributive shares of the fund. The court were of opinion that no claim had yet been made for the distributive shares; but that, according to the true meaning of the bequest, the legatees were not entitled to both funds, and that, for the purposes of the settlement of the estate, they should be put to their election within a time mentioned. We are inclined to think, upon the facts in the case, a claim had already been made of the fund by the legatees and those representing them, which came from the estate of the testator through their grandmother, under and by virtue of one of the interdicted deeds, and which operated to annul the legacies; but, as the views of the court \*below, and the decree in pursuance thereof, lead to the [\* 260] same result substantially, it is unnecessary to interfere with them.

The condition upon which the legacies were to fall is very specific and explicit: that "if the said children," "or either of them, or any person or persons on their behalf or account, or in behalf or on account of either of them, as heirs or heirs-at-law, or devisees or devisee of their grandmother," "shall claim, ask, or demand, sue for, recover, or receive any part or portion of my estate, rights or credits, either in my lifetime or after my decease, under or by virtue of certain indentures—enumerating three—or under or by virtue of any other indenture," "which the said Thomas Law and E. P. Law, or E. P. Custis, meaning Mrs. Law, may have been parties, or to which any other person or persons with the said Thomas Law may have been parties for the benefit of E. P. Law, or E. P. Custis, or her heirs; then, and in that case, the bequest, &c., shall be null and void."

Besides the distributive shares to the grandchildren, which the court below held as coming from one of the interdicted deeds, and inconsistent with the condition upon which the bequests of the legacies were made, the two surviving grandchildren had set up a claim in that court to an interest amounting to the sum of \$66,154.84, under the interdicted deeds of 1796, 1800, and 1802,

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Rogers v. Law's Executors.

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and which sum was awarded to them by the decree of the court. On an appeal to this court the decree was reversed, and the claim disallowed, as will be seen in the report of the case already referred to. We are of opinion this claim and litigation were in violation of the condition annexed to the bequest of the legacies. The legatees are forbidden to claim, ask, demand, sue for, recover, or receive any portion of the estate of the testator under these deeds, as the representatives of their grandmother.

The testator in his will had stated his fears that he had settled upon the children of his daughter—these grandchildren—more than the other grandchildren would receive from his estate, unless his property should rise in value, in which case he would make another will. This impression, doubtless, led to the stringent condition annexed to the bequest in the codicil \* which was executed nearly two years later. The condition is not put upon the possession, recovery, or receipt of any portion of his estate under these deeds, but upon a claim or demand, or suit for the same; and the testator directs, if the terms of the bequest are not acceptable to the grandchildren, that his executor shall contest with them to the utmost their right to claim the legacies. It may well, we think, be doubted, if the judgment of the court against their claim, under these deeds, after a long and expensive litigation, can save the legacies from a breach of the condition. The very special terms of it would seem to have been intended to save the estate from any such litigation, so far as regarded the right to the enjoyment of the legacies.

An objection was taken, on the argument, to the legal effect and operation of this condition, but we entertain no doubt as to its force and validity. The condition is lawful, and one which the testator had a right to annex in the disposition of his own property. The legatees are not bound to accept the bequest, but, if accepted, it must be subject to the disabilities annexed; it must be taken *cum onere*, or not at all.

There are some other items of minor importance, to which exceptions have been taken, but we see no well-grounded objection to them.

The decree of the court below affirmed.

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The Attorney General of Massachusetts v. The Federal Street Meeting-House.

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THE ATTORNEY GENERAL OF MASSACHUSETTS, Plaintiff in Error, v. THE  
FEDERAL STREET MEETING-HOUSE.

1 BLACK, 262.

JURISDICTION OVER STATE COURTS.

1. An act of the legislature incorporating the members of a church into a body politic, with rights of property, does not on its face impair the obligation of any trust under which the land and meeting-house was originally granted.
2. Nor in this case does it appear by any averments in the bill or the decree of the court dismissing it, or by anything else in the record, that such a question was raised or decided by the State court, to which this writ is directed, and it must therefore be dismissed.

THIS is a writ of error to the supreme judicial court of Massachusetts. The case is stated in the opinion.

*Mr. Bartlett*, for defendants, moved to dismiss the writ for want of jurisdiction.

*Mr. Cushing* opposed the motion.

\* Mr. Justice GRIER delivered the opinion of the court. [ \* 265 ]

The writ of error in this case suggests, as a foundation for the jurisdiction of this court, "that there was drawn in question the validity of a statute of said commonwealth, to wit, an act of the legislature, passed the 15th day of June, 1805, entitled 'An act declaring and confirming the incorporation of the proprietors of the meeting-house in Federal street,' in the town of Boston, being repugnant to the constitution of the United States, and the decision of the court was in favor of the validity of said statute."

Is this suggestion of the writ supported by the record, either by direct averment, or by any necessary intendment?

We think it is not.

1. The decree of the court is, simply, that the bill be dismissed without any reasons alleged for such dismissal.

2. The bill itself raises no such issue; it refers to the act in question, only as conferring the privilege of a corporation on the defendant. It does not aver that the defendants pretend to have title to the property in question by virtue thereof, and challenge its validity.

The answer alleges that respondents were incorporated by the act of 1805, and that, "under it, they are the true and sole \*owners of the premises, and that said act was passed on [ \* 266 ] the application and petition of parties who, prior thereto, were owners of pews, or tenants in common of the land and the

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The United States v. Wilson.

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house thereon." It is not alleged that the act "*proprio vigore*" divested the plaintiff's title and vested it in the corporation, but that the title was vested in the corporation at the request of the owners.

The only questions, therefore, which could arise on these pleadings were, whether the persons who obtained the act of incorporation were the owners, and whether, after an adverse possession of forty years, a court of equity would interfere to disturb the possession of respondents.

The answer takes issue on the charge of the bill, that Little and his associates had contributed land and money to support a public *charity*; it averred that, on a proper construction of the original deed of the premises, the meeting-house was not dedicated to a charitable use, but was erected for their common use, and held by them in proportion to the sums severally contributed; and, consequently, if the representatives of these tenants in common had their rights transferred to the corporation, it was only a transfer of their rights by their consent, and for their own convenience—an enabling act, with which the complainants had no concern. The issue, then, was not on the validity of the act, but on the construction of the original deed or agreement of the parties who built the meeting-house. The validity of the act of assembly of Massachusetts was not, therefore, drawn in question directly by any averment of the pleadings by the decree, or by any necessary intendment from other averments in the pleadings, or evidence on the record.

The opinion of the State court to be found in 3 Gray, 1, confirms this conclusion.

The case is, therefore, dismissed for want of jurisdiction.

Writ of error dismissed.

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THE UNITED STATES, Appellants, v. JOHN WILSON.

1 Black, 267.

CALIFORNIA LAND GRANTS.

1. It was the custom in Mexico for the governor to grant or set apart to the Indians settled around a mission, called children of the mission, small lots of land, and the alcalde kept a book in which such grants were registered. This court recognizes such grants as valid, and holds they should be confirmed.
2. In the present case, the proof shows that such a grant was made and registered, and the grantee of claimant lived on the land; and though the record was lost in the confusion of the time of the American conflict, it is sufficiently established to be confirmed.
3. But the claim received no support from a concession signed by Pio Pico, governor, on the 10th of July, 1846, after the Americans had taken possession of the country.



APPEAL from the district court for the southern district of California. The case is stated in the opinion.

*Mr. Black*, for the United States.

No counsel for appellee.

\*Mr. Justice NELSON delivered the opinion of the court. [ \* 268 ]

This is an appeal from a decree of the district court for the southern district of California.

The tract of land in dispute is situated at the mission of San Luis Obispo, called the Huerta de Romualdo, and is one thousand varas in length and three hundred in breadth, containing some fifty acres of land. Wilson, the claimant below, derived his claim from an Indian by the name of Romualdo, in 1846. In 1842, Governor Alvarado directed Bonilla, the alcalde at the mission of Obispo, to distribute lands of the mission among the Indians residing there, in separate parcels, as might be deemed proper, proportioning the quantities according to the merits and abilities of each one, putting them into possession immediately.

The alcalde, who is a witness on behalf of the claimants, states that, under this order of the governor, he distributed \* lands contiguous to the mission, some two miles in [ \* 269 ] length, and at other different points about a mile, where these Indians had their houses and gardens. The lands were given, as to quantity, with regard to the number in the family, the maximum generally being two hundred varas, and the minimum one hundred.

The alcalde states that he did not set off to Romualdo the land he claimed at the time, as the tract was of greater extension than he gave the others; but that the Indian afterwards, in the same year, brought a special order from the governor, which directed him to put Romualdo into the possession of the entire extension of the "Huerta," on which he lived. The alcalde testifies to the genuineness of this special order. He gave the possession to the Indian accordingly. A record was kept of the distribution of these lands in a book in his office, as well as the orders from the governor; but this book was lost, with all the archives of his office, in 1846, when the American troops passed through the mission. Romualdo had worked for the governor, and his good conduct was recommended in the special order for the distribution of his Huerta to him. He was advanced in age, and had lived on this place for many years, and had under cultivation, according to opinion of the alcalde, a fourth of the land.

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The United States *v.* Wilson.

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There is a grant of Pio Pico to the Indian of the same piece of land, dated 10th July, 1846; but this was after the conquest of the country by this government, and adds nothing to the strength or justice of the claim. The right stood before the commissioners principally upon this grant of Pio Pico, and it was rejected for the reason stated.

The further proof by Bonilla of the claim under Alvarado was given before the district judge. The only evidence of this source of claim before the commissioners was the certificate of Alvarado and of Bonilla, which was properly regarded as incompetent and inadmissible. The district judge confirmed the claim.

The title seems to be in conformity with the practice and usage of the Mexican government, in setting apart small tracts connected with the huts or houses in which the Indians lived [ \* 270 ] \* around the missions, and which were cultivated as gardens. In the present instance, the possession and cultivation were of considerable duration; and, according to the testimony of the alcalde, the distribution and assignment of the governor was intended to be permanent, as a home to the occupant. The claim appears to be an honest one, unaccompanied with suspicion; and, under the circumstances, we think was properly confirmed.

It comes within the principle of the case of the United States *v.* De Haro's Heirs, (22 How. 293.)

As there is some question as to the extent of the claim, the petitioners setting up a right to a much larger tract than stated in the evidence in the case that belonged to Romualdo, and as the confirmation also is a confirmation to Wilson, the petitioner, we shall modify the decree of the court below, so as to confirm the claim as if presented in the name of the original claimant to him and his legal representatives; and, further, that the judge of the court below may direct a survey of the claim, if applied for by the government.

With these modifications the decree below is affirmed.

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 Pratt v. Fitzhugh.
 

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PRATT, Plaintiff in Error, v. FITZHUGH, and others.

1 Black, 271.

JURISDICTION OF SUPREME COURT OVER CIRCUIT COURTS—AMOUNT IN CONTROVERSY.

1. The appellate jurisdiction of this court over the judgment of the circuit courts depends upon the amount in controversy, to wit, over \$2,000. This implies a suit or judgment which involves a proper value.
2. Therefore, a judgment or order of the court discharging prisoners on a writ of *habeas corpus* is not a judgment which this court can revise.
3. It constitutes no exception to this rule, that the prisoners were held on a writ of *capias* to answer a decree in admiralty of the same court for \$21,581.28.

WRIT of error to the circuit court for the district of Kentucky.  
The case is stated in the opinion.

*Mr. Rogers*, for plaintiff.

*Mr. Grant*, for defendants.

\* Mr. Justice NELSON delivered the opinion of the court. [ \* 272 ]

Pratt, the plaintiff in error, obtained a decree in admiralty against the propeller Kentucky for a collision on Lake Erie. The defendants had given a bond as sureties for the discharge of the vessel from the attachment when first seized, and a summary decree was entered against them, according to the rules and practice in the district court. Execution was issued, commanding the marshal to make the decree out of the goods and chattels, &c., of the defendants; and in default thereof, to arrest and keep them in custody till the moneys were paid, &c. The defendants were arrested and imprisoned under this process. Afterwards a writ of *habeas corpus* was issued by the circuit court for the northern district of New York, and upon a return of the marshal, setting forth the above facts, as furnishing the authority for the imprisonment, an order was entered discharging them from imprisonment, holding that, as the State of New York had abolished imprisonment for debt on contracts, the defendants could not be imprisoned within the acts of congress of the 28th February, 1839, and 14th June, 1841.

The case is before us on a writ of error. A motion has been made to dismiss the case for want of jurisdiction.

The case is brought up under the 22d section of the judiciary act, which confines the writ of error to cases "where the matter \*in dispute exceeds the sum or value of two thousand [ \* 273 ] dollars, exclusive of costs." This has always been held

Moffitt v. Garr.

to mean a property value, and without the fact of value being shown on the record, or by evidence *aliunde*, the court has no jurisdiction to hear or re-examine the case. The cases of *Weston v. The City Council of South Carolina*, (2 Peters, 449,) and *Holmes v. Jennison*, (14 ib. 540,) referred to, were brought up from State courts under the 25th section of the judiciary act, in which case no value is required. We do not doubt but that the order discharging the defendants was a final one, and that the only objection to the jurisdiction is the one above stated.

Judgment dismissing the cause for want of jurisdiction.

JOHN R. MOFFITT, Plaintiff in Error, v. JOHN M. GARR and others.

1 Black, 273.

PATENT LAW—EFFECT OF SURRENDER.

1. A patent surrendered for the purpose of a reissue, under the 13th section of the act of July 4, 1836, is a legal cancellation of it, and in judgment of law extinguishes it.
2. To a suit commenced before such a surrender, a plea that since the commencement of the action the plaintiff has surrendered his patent and obtained a reissue, is a valid defense.
3. But it does not follow that money paid under the former patent can be recovered back. They may be voluntary payments, or, if under judgments, are protected as *res judicata*.

WRIT of error to the circuit court for the southern district of Ohio. The case is stated in the opinion.

*Mr. Lee* and *Mr. Fisher*, for plaintiff.

*Mr. Stanbery*, for defendant.

[ \* 282 ] \*Mr. Justice NELSON delivered the opinion of the court.

The suit was brought by Moffitt against the defendants, for the infringement of a patent for an "improvement in grain separators."

The defendants plead to the declaration, that since the commencement of the suit, the plaintiff had surrendered his patent to the United States, for the alleged infringement of which the action was brought. To which the plaintiff put in a general demurrer. The court overruled the demurrer, and sustained the plea, and gave judgment accordingly.

The 13th section of the act of congress of July 4, 1836, provides, "that if a patent shall be inoperative, &c., it shall be lawful for the commissioner, upon the surrender to him of such patent," "to cause a new patent to be issued, &c., and the patent so reissued"

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The United States v. Vallejo.

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“shall have the same effect and operation in law on the trial of all actions hereafter commenced, for causes subsequently accruing, as though the same had been originally filed in the connected form,” &c.

Now, the point in the case is, whether or not the patentee may maintain a suit on the surrendered patent instituted before the surrender, if he has not availed himself of the whole of the provision, and taken out a reissue of his patent with an amended specification. The construction given to this section, \*so [\* 283] far as we know, and the practice under it, in case of a surrender and reissue, are that the pending suits fall with the surrender. A surrender of the patent to the commissioner within the sense of the provision, means an act which, in judgment of law, extinguishes the patent. It is a legal cancellation of it, and hence can no more be the foundation for the assertion of a right after the surrender, than could an act of congress which has been repealed. It has frequently been determined that suits pending, which rest upon an act of congress, fall with the repeal of it. The reissue of the patent has no connection with or bearing upon antecedent suits; it has as to subsequent suits. The antecedent suits depend upon the patent existing at the time they were commenced, and unless it exists, and is in force at the time of trial and judgment, the suits fail.

It is a mistake to suppose, that, upon this construction, moneys recovered on judgments in suits, or voluntary payment under the first patent upon the surrender, might be recovered back. The title to these moneys does not depend upon the patent, but upon the voluntary payment or the judgment of the court.

We are satisfied the judgment of the court below is right, and should be affirmed.

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THE UNITED STATES, Appellants, v. VALLEJO.

1 Black, 283.

## CALIFORNIA LAND GRANT.

There is no objection to the original grant to Píña in this case; and the fact that the date of his transfer to the present claimant was before the date of his grant, does not invalidate it.

APPEAL from the district court for the district of California.

There was no objection to this grant, except that it was transferred to the present claimant before the grant issued, and while the petition and proceedings were pending which resulted in the concession.

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The Ohio and Mississippi Railroad Co. v. Wheeler.

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*Mr. Black*, for the United States.

*Mr. Reverdy Johnson*, for appellee.

[ \* 285 ] \*Mr. Justice WAYNE delivered the opinion of the court.

This claim is founded upon a grant from Governor Alvarado to Lazaro Piña of the date of July 13, 1840. The original grant was not produced, and is supposed to have been lost during the war between the United States and Mexico, in which the grantee was killed. The expediente is numbered by Jimeno and noted in his index. It exists complete among the archives. The journal of the departmental assembly shows that the grant was approved October 8, 1845. Piña, the grantee, occupied the land for several years. The error of date in the conveyance from Piña to Vallejo cannot raise a suspicion against the regularity of the grant. It is the opinion of this court that the original claim is a good and valid claim, and that the same should be, and hereby is confirmed.

Decree of the district court affirmed.

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THE OHIO AND MISSISSIPPI RAILROAD COMPANY, Plaintiff in Error, v.  
HENRY D. WHEELER.

1 Black, 286.

JURISDICTION OF CIRCUIT COURTS—CITIZENSHIP OF CORPORATIONS.

1. It is the settled doctrine of this court that a suit by or against a corporation, in its corporate capacity, is a suit by or against citizens of the State which created it; and no averment to the contrary will be heard to defeat the jurisdiction of the circuit court.
2. It follows that a statement in the declaration that plaintiff is a corporation created by the laws of the States of Ohio and Indiana, implies a suit in which plaintiffs are citizens of both those States.
3. It also follows that no such suit can be maintained in the circuit court for the district of Indiana against a citizen of that State.

THE case comes here on a certificate of division of opinion, the matter of which is stated in the opinion.

*Mr. Vinton*, for plaintiff.

*Mr. Porter*, for defendant.

[ \* 295 ] \*Mr. Chief Justice TANEY delivered the opinion of the court.

This action was brought in the circuit court of the United States for the district of Indiana, to recover \$2,400, with ten per cent.

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The Ohio and Mississippi Railroad Co. v. Wheeler.

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damages, which the plaintiffs alleged to be due for fifty shares of the capital stock of the company, subscribed by the defendant.

The declaration states that the plaintiffs are "a corporation, created by the laws of the States of Indiana and Ohio, having its principal place of business in Cincinnati, in the State of Ohio; that the corporation is a citizen of the State of Ohio, and Henry D. Wheeler, the defendant, is a citizen of the State of Indiana."

The defendant pleaded to the jurisdiction of the court, averring that he was a citizen of the State of Indiana, and that the plaintiffs were a body politic and corporate, created, organized, and existing in the same State, under and by virtue of an act of assembly of the State.

The plaintiffs demurred to this plea; and the judges being opposed in opinion upon the question whether their court had jurisdiction, ordered their division of opinion to be certified to this court.

A brief reference to cases heretofore decided will show how the question must be answered. And, as the subject was fully considered and discussed in the cases to which we are about to refer, it is unnecessary to state here the principles and rules of law which have heretofore governed the decisions of the court, and must decide the question now before us.

In the case of the *Bank of Augusta v. Earle*, (13 Pet. 512,) the court held, that the artificial person or legal entity known to the common law as a corporation can have no legal existence out of the bounds of the sovereignty by which it is created; that it exists only in contemplation of law, and by force of law; and where that law ceases to operate, the corporation can have no existence. It must dwell in the place of its creation.

It had been decided, in the case of the *Bank v. Deviary*, (5 Cr. 61,) long before the case of the *Bank of Augusta v. Earle* came before the court, that a corporation is not a citizen, within the meaning of the constitution of the United States, and \*cannot [ \* 296 ] maintain a suit in a court of the United States against the citizen of a different State from that by which it was chartered, unless the persons who compose the corporate body are all citizens of that State. But, if that be the case, they may sue by their corporate name, averring the citizenship of all of the members; and such a suit would be regarded as the joint suit of the individual persons, united together in the corporate body, and acting under the name conferred upon them, for the more convenient transaction of business, and consequently entitled to maintain a suit in the courts of the United States against a citizen of another State.

This question, as to the character of a corporation, and the juris-

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The Ohio and Mississippi Railroad Co. v. Wheeler.

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diction of the courts of the United States, in cases wherein they were sued, or brought suit in their corporate name, was again brought before the court in the case of *The Louisville, Cincinnati and Charleston Railroad Company v. Letson*, reported in 2 How. 497; and the court in that case, upon full consideration, decided, that where a corporation is created by the laws of a State, the legal presumption is, that its members are citizens of the State in which alone the corporate body has a legal existence; and that a suit by or against a corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporate body; and that no averment or evidence to the contrary is admissible, for the purposes of withdrawing the suit from the jurisdiction of a court of the United States.

The question, however, was felt by this court to be one of great difficulty and delicacy; and it was again argued and maturely considered in the case of *Marshall v. The Baltimore and Ohio Railroad Company*, (16 How. 314,) as will appear by the report, and the decision in the case of *The Louisville, Cincinnati and Charleston Railroad Company v. Letson* reaffirmed.

And again, in the case of *The Covington Drawbridge Company v. Shepherd and others*, (20 How. 232,) the same question of jurisdiction was presented, and the rule laid down in the two last-mentioned cases fully maintained. After these successive decisions, the law upon this subject must be regarded as settled; and a [ \* 297 ] suit by or against a corporation in its corporate \* name, as a suit by or against citizens of the State which created it.

It follows from these decisions, that this suit in the corporate name is, in contemplation of law, the suit of the individual persons who compose it, and must, therefore, be regarded and treated as a suit in which citizens of Ohio and Indiana are joined as plaintiffs in an action against a citizen of the last-mentioned State. Such an action cannot be maintained in a court of the United States, where jurisdiction of the case depends altogether on the citizenship of the parties. And, in such a suit, it can make no difference whether the plaintiffs sue in their own proper names, or by the corporate name and style by which they are described.

The averments in the declaration would seem to imply that the plaintiffs claim to have been created a corporate body, and to have been endued with the capacities and faculties it possesses by the co-operating legislation of the two States, and to be one and the same legal being in both States.

If this were the case, it would not affect the question of jurisdiction in this suit. But such a corporation can have no legal



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The United States v. Neleigh.

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existence upon the principles of the common law, or under the decision of this court in the case of the *Bank of Augusta v. Earle*, before referred to.

It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the States of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the States as one corporate body, exercising the same powers and fulfilling the same duties in both States. Yet it has no legal existence in either State, except by the law of the State. And neither State could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the State or sovereignty which brings it into life and endues it with its faculties and powers. The President and Directors \* of [ \* 298 ] the Ohio and Mississippi Railroad Company, is, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a circuit court of the United States.

These questions, however, have been so fully examined in the cases above referred to, that further discussion can hardly be necessary in deciding the case before us. And we shall certify to the circuit court, that it has no jurisdiction of the case on the facts presented by the pleadings.

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THE UNITED STATES, Appellants, v. ROBERT B. NELEIGH.

1 Black, 298.

CALIFORNIA LAND GRANTS.

1. This is a claim for six leagues out of the eleven-league grant to Castro, the whole of whose claim was rejected by this court, 24 How. 347, (4 Miller, 163,) and no additional evidence of value is now introduced.
2. The court comments on the attempt of Pio Pico to make grants, after his overthrow as governor, by signing concessions, as a material fact, and that his secretaries, Morena especially, are unworthy of credit, as requiring caution in the court in confirming grants with no other support.
3. The fact that some few documents were lost and destroyed by their removal under Fremont, is not to be received as a substitute for record evidence of title, until it is proved that the instrument produced *was* recorded in some book which is shown to be lost.

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The United States v. Neleigh.

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APPEAL from the district court of California. The case is stated in the opinion.

*Mr. Shenck* and *Mr. Black*, for appellants.

*Mr. Johnson* and *Mr. Gillet*, for appellee.

[ \*305 ] \* Mr. Justice GRIER delivered the opinion of the court.

Neleigh filed his claim before the board of land commissioners on the 3d of September, 1852. It was for six leagues of land in Mariposa county, being part of eleven leagues said to have been granted to Lieut. Col. José Castro by Pio Pico, late governor, on the 4th of April, 1846. The deed from Castro, dated 8th of June, 1849, purported to convey to Bernard McKenzie and Robert Neleigh six of the eleven leagues, "to be taken where the grantees might select." McKenzie's interest was, afterwards, vested in his co-tenant by a conveyance from his administratrix. The commissioners confirmed the claim. But as the grant to Castro had never been surveyed or located, and, like that to Fremont, was vague and uncertain as to its boundary, it might be located on either or both sides of the San Joaquin river. Their decree, therefore, did not ascertain what land was confirmed, but ordered that it be "selected by the said petitioner from the said eleven leagues *when the same shall be located by the proper authority.*" This decision of the board was affirmed by the district court in October, 1859.

In the meantime, José Castro, in March, 1853, filed his claim for the eleven leagues, "for the benefit of himself and those claiming under him." That case came before this court at last term, and may be found reported in 24 Howard, 347. It was rejected by this court, for the reason there given, and which need not be repeated. Nor need we inquire of what use the affirmation of the decree of the district court would be to Neleigh of a right to select six leagues out of eleven, which, by judgment of this court, never can be surveyed or located. For the purposes of the present case, also, we will assume, that as Neleigh was not a party on record in the former case, he is not concluded by the judgment given in it, and inquire whether he has furnished any new evidence, which, if it had been found in the record of the Castro case, would have led us to a

different conclusion. Now, it must be kept in remembrance

[ \*306 ] that the grant to Castro was not rejected, because \*it was not signed by the persons whose names are affixed to it.

It is a historical fact, and proved by satisfactory evidence, more than once, that, after that country passed into the possession of the United States, the late governor was very liberal in executing grants

to any person who desired them, and for any quantity of land. It was easy to prove his signatures, and Pio Pico himself, when called as a witness, could never recollect anything about *the date*, which was the only material question in the inquiry as to its validity. Of the last two secretaries who attested these grants, one has been found capable, not only of writing false grants, but of supporting them by his oath. Of the other, we have been compelled to say, that he was following in the footsteps of his predecessor.

It is well known that *espedientes* and records of the grants made in Pico's time were carefully put away by him in boxes, which came into the possession of Colonel Fremont, and were delivered to the public officers. These *espedientes* are all found safe among the records, but the "*toma de razon*," or short record of them, has disappeared. Hence, when a grant is produced for the first time from the pocket of the claimant, and is attempted to be established by proof of the signatures of the governor and secretary, the want of an *espediente* or archive evidence is expected to be excused by the proof that some papers were lost and torn when they were carried away on mules by Colonel Fremont, or used "*as cartridge paper*," according to Pio Pico's theory. The enormous frauds which have been attempted to be perpetrated, depending on this theory of the destruction of records, have compelled us to reject it altogether as fabulous. These archives have been collected, and are found in a very tolerable state of preservation. Hence, the propositions laid down in the Castro case, and others preceding it, were an absolute necessity to save the government from utter spoliation of its territory.

It would be superfluous to repeat the principles laid down in the Castro case. It is sufficient to say, that the additional testimony in this case does not relieve it from its deficiencies there stated. The testimony of Colonel Fremont of having seen some paper concerning a grant to Castro, does not prove \* the [\* 307] existence of *this* grant, which was not the only property claimed by Castro in California. The testimony of the late governor adds nothing to the evidence. He, as usual, acknowledges the genuineness of his signature, which was not disputed; but as to the important question, whether it was made before or after his expulsion by the Americans, he is entirely silent. He could not remember historical facts connected with his administration; that at the *date* of this grant he was at bitter feud with Castro, who had seized upon the custom house at Monterey, and set the governor at defiance, and that the governor was preparing troops, at this time, to compel his submission. The declaration of the witness, that he should nevertheless as soon make a grant to Castro as to any other.

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is no doubt true, if it refers to the true date of the transaction, after they had both been superseded and deposed by the Americans. Nor does it add anything to the value of this testimony, that the witness explains that, by want of recollection, he means his unwillingness to state the truth.

Moreno, who is always a more willing witness, and who labors under no want of memory or imagination, is brought to supply this want of record proof, and accounts for his signature to the grant being dated when he was *not* secretary. He swears that he signed it after its date, in the beginning of May, but whether it was May, 1846, 1847, or 1848, he does not state directly, but leaves it to inference that he meant 1846.

But if we were in any doubt as to the credibility of the testimony of this witness, there are other facts established which demonstrate, that if he had stated explicitly that he signed this grant, and recorded it in May, 1846, the assertion would have been untrue.

On the 4th of April, 1846, the date of this grant, it is a fact not only that Moreno was not secretary, but that Pio Pico *was not governor*. He first presented his appointment as governor, to the assembly, on the 15th of April, 1846, and was inaugurated on the 18th. The first grant made by him, in which he is styled governor, is that to Pedro Sansevaine, dated the 21st of April. In all his previous grants he is styled "First Vocal and Governor [\* 308] *ad interim*." This deed was evidently written \*so long after, that this fact had escaped the recollection of the parties signing it. In the beginning of May, 1846, it was becoming apparent to all concerned that the power of the governor and the assembly would soon pass away. Pio Pico, therefore, prudently gathered up the grants of land which had not been previously laid before the departmental assembly for their approval. He accordingly, on the 3d of June, 1856, sent in to them no less than forty-five *espedientes*. One of these was made in 1839. The others were all dated in 1845 and 1846; the last three on the 2d and 3d of May, 1846. Fortunately, we have the minutes of the assembly, by which it appears that these forty-five *espedientes* were reported and confirmed on the 8th of June, 1846. This grant to Castro does not appear among them, and is left to the uncertain testimony of Moreno to establish its existence; and we are asked to presume that it alone was kept back from the assembly, and that while all the other genuine grants confirmed by them are found among the archives in good order, this alone was converted into "cartridge paper." All these presumptions must be made on the faith of these witnesses, whose testi-

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mony we have heretofore declared could not be received to contradict or supply record evidence.

In the former case, this grant to Castro was rejected for the negative reason that there was not the evidence required to prove it genuine. The testimony in the present case has proved it positively spurious.

Let the decree of the district court be reversed.

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FARNI, Plaintiff in Error, v. TESSON.

1 Black, 309.

PLEADING—NON-JOINDER OF CO-OBLIGEE.

1. It is an elemental principle of the common law, where a contract is jointly payable to several, a defendant can take advantage of the non-joinder of all the obligees by demurrer or in arrest of judgment on the general issue.
2. The objection is not obviated by an allegation in the declaration that plaintiff's is the sole beneficial interest in the bond, the others being sheriffs, agents, and mere nominal obligees.
3. This principle of the common law, though technical, cannot be disregarded by the federal courts without the aid of a statute.

WRIT of error to the circuit court for the northern district of Illinois. The action was a suit on an injunction bond, in which the obligees were Tesson and Danger, partners, and Miner, the sheriff, and Gareshe and Tuber, who were agents and trustees, with no personal interest. Tesson sued alone, alleging the death of Danger, and the want of interest in the others. After verdict he moved an arrest of judgment for the non-joinder of the other obligees in the bond.

*Mr. Fuller and Mr. Carlisle*, for plaintiff.

*Mr. Vinton*, for defendant.

\* Mr. Justice GRIER delivered the opinion of the court. [ \* 314 ]

The amendments made to the declaration after demurrer have not removed the original mistake, as to the parties who should have been joined as plaintiffs. In an action of debt on bond, the demand is for the penalty. The condition of the bond is no part of the obligation. It is true, the judgment for the penalty will be released, on performance of the condition annexed to it. The plaintiff may declare on it as single, and defendant would then have to pray oyer of the deed, and have the condition put on the record, so that he could plead a performance of it, or any other

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defense founded on it. The bond being set forth at length in the declaration, precluded the necessity of oyer, but did not relieve the pleader from the mistake patent in his plea. He sues on a several covenant to pay a sum of money to A, and shows a covenant to pay A B and C jointly. If one of the joint covenantees be dead, a suggestion of that fact is sufficient to show a right to sue in the names of the survivors. If, by the condition, the money to be recovered be not for the joint benefit of all, the suggestion of that fact cannot alter the obligation; but will show only that, though all the parties to it should join in the suit, and show a legal title to recover, the judgment will be for the use of the party named in the condition, and equitably entitled to the money. The true reason for the course pursued by the pleader in this case, though not alleged in the pleading, was, perhaps, to give jurisdiction to the circuit court of the United States, by omitting the names of obligees who are citizens of Illinois. But it is admitted [ \*315 ] that such a \*reason, even if alleged in the pleading, would not have cured the omission.

It is an elemental principle of the common law, that where a contract is joint and not several, all the joint obligees who are alive must be joined as plaintiffs, and that the defendant can object to a non-joinder of plaintiffs, not only by demurrer but in arrest of judgment, under the plea of the general issue.

When there are several covenants by the obligors, as, for instance, "to pay \$300 to A and B, viz: to A \$100, and B \$200," no doubt each may sue alone on his several covenant. The true rule, as stated by Baron Parke, is, that "a covenant may be construed to be joint or several, according to the interests of the parties appearing upon the face of the obligation, if *the words are capable of such a construction*; but it will not be construed to be several, by reason of several interests, if it be expressly joint." In this case, the covenant is joint, and will admit of no construction. The condition annexed cannot affect the plain words of the obligation.

It has not been denied on the argument that such is the established rule of the law, and such the plain construction of the bond; but it is insisted, that the court should disregard it as merely a *technical* rule, which does not affect the merits of the controversy. The same reason would require the court to reject all rules of pleading. These rules are founded on sound reason, and long experience of their benefits.

It is no wrong or hardship to suitors who come to the courts for a remedy, to be required to do it in the mode established by the

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law. State legislatures may substitute, by codes, the whims of sciolists and inventors for the experience and wisdom of ages; but the success of these experiments is not such as to allure the court to follow their example. If any one should be curious on this subject, the cases of *Randon v. Toby*, (11 How. 517;) of *Bennet v. Butterworth*, (ib. 667;) of *McFaul v. Ramsey*, (20 How. 523;) and *Green v. Custard*, (23 How. 484,) may be consulted.

The judgment of the circuit court is therefore reversed, with costs.

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JOHN P. HARKNESS and MARIA, his wife, Appellants, v. ISAAC UNDERHILL.

1 Black, 316.

FRAUD IN OBTAINING PRE-EMPTION CERTIFICATES—LAPSE OF TIME.

1. An agreement between two to obtain a pre-emption entry of the public lands by a simulated settlement which was a fraud on the land office, cannot be the foundation of a suit in equity by a party claiming under this contract to get a decree for the legal title.
2. Where one of the parties to the fraudulent agreement does afterwards make an actual and *bona fide* settlement, and claims a pre-emption right under it, the land office was right in setting aside the first and fraudulent entry in favor of his claim.
3. A bill in equity brought by a purchaser of the first claim, sixteen years after the patent was issued under the second, and accompanied with possession in the hands of a subsequent purchaser, comes too late.

APPEAL from the circuit court for the northern district of Illinois. The case is stated in the opinion.

*Mr. Williams*, for appellants.

*Mr. Carlisle* and *Mr. Webb*, for defendants.

\*Mr. Justice CATRON delivered the opinion of the court. [\* 323]

In the winter or spring of 1832, Isaac Waters and Stephen Stillman agreed to cultivate and improve the east half of the southeast quarter of section four, a portion of which is in controversy in this suit. This arrangement was made in view of the probability that congress would, at its then session, pass a pre-emption law. It was further stipulated that Waters should make the necessary proof to obtain the pre-emption. As was anticipated, the act of April 5, 1832, was passed, allowing "to actual settlers, being housekeepers," a pre-emption to enter a half-quarter section to include his improvement. Waters went on the land, made a slight improvement for the purpose of cultivation, erected a tem-

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porary hut, or rather a pen, put some furniture in it, and he, with a part of his family, went into the hut, staid there a couple of days, and then returned to his residence in the village of Peoria, where he resided, and continued to reside. He was a substantial resident of the village, having a house, home, and family there. The half-quarter section adjoined the village property. Waters made an affidavit in September, 1832, that he was an actual settler and housekeeper on the land. He does not say at what time, but he applied to enter under the provisions of the act of April 5, 1832. He also procured the affidavit of one Trail, who swore that Waters was an actual settler and housekeeper on the half-quarter section.

In July 1833, Waters, in a written agreement with Stillman, and Wm. A. Stewart, recited the terms on which he and Stillman agreed to improve the land, to wit: that the entry was to be made

for their joint benefit on the proofs furnished by Waters.

[ \* 324 ] Stewart, at the date of the agreement, stipulated to \* pay

Stillman's moiety of the purchase-money, and Waters was bound to convey to Stewart and Stillman one-half of the eighty acres; and it appears by a covenant, dated July 2, 1835, executed by Waters to Pettingal and Walcott, that Waters's portion was the western forty acres, which he bound himself to convey to Pettingal and Walcott, they being purchasers from Waters. Waters soon thereafter died, leaving a widow and children, and they entered the half-quarter section, in the name of Waters, at the land office at Quincy, August 7, 1835. The entry stood in this condition till May, 1838, when the commissioner of the general land office informed the register and receiver at Quincy that, Stephen Stillman's heirs having applied to them to enter the half-quarter section, containing eighty acres, and having adduced evidence to the commissioner tending to prove that Waters went on the land into a log-pen, without a roof, and staid there only one night; furthermore, that the affidavits of Waters and Trail being evasive, and not stating that Waters was an actual settler on the 5th of April, 1832, the register and receiver were, therefore, instructed, that if they believed the facts, as respects the frauds practised to obtain the entry in Waters's name, to treat it as void, for fraud, and allow Stillman's heirs to enter the land; and this was accordingly done. The entry in Stillman's name was made under the occupant law of 1834.

We concur with the commissioner's directions, and the finding of the register and receiver, that the proceeding of Waters was a fraudulent contrivance to secure the valuable privilege of a preference of entry. It was an attempt to speculate on his part, and also on the part of Stillman, his co-partner, by fraud and falsehood. They



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both new equally well that Waters was no actual settler on the public lands at any time, and that the affidavits of Waters and Trail were false.

The principal ground on which the bill is founded assumes that the complainant, as assignee of Waters's heirs, is entitled to a decree against the respondent, because his title was derived through Stillman, and that Stillman came into possession under Waters, and therefore Stillman's assignee cannot dispute the title of him under whom he held possession, according to the \*doctrine [ \* 325 ] maintained by this court in the case of Thredgill v. Pintard, (12 How. 24.)

In Thredgill's case the transaction was fair, and obviously honest. The consideration between the parties was full and undoubted; their contracts bound them. But in this case there was no legal contract between Stillman and Waters. They combined to defraud the government; their agreement was contrary to public policy, because it was intended by contrivance to take the land out of the market at public sale—a cherished policy of the government. Such an agreement can have no standing in a court of justice.

But there is another defense equally conclusive. The bill seeks the legal title from Underhill; he holds under a patent, dated in 1838; he purchased in 1841, and has been in uninterrupted possession ever since. This suit was brought in 1854. In the meantime, the land sued for has been partly laid off into lots, and become city property; yet, Waters's claim lay dormant after his entry was set aside at the general land office for eighteen years, and fourteen years after the patent in Stillman's name was issued, and the land conveyed to Underhill by Wren. Underhill, and those holding under him, have held possession from 1841 to the time when this suit was brought; and, in the meantime, the land had greatly increased in value, and changed in its circumstances. These facts present a case on which a court of equity cannot decree for the complainant, if there was no other defense.

The question is again raised, whether this entry, having been allowed by the register and receiver, could be set aside by the commissioner. All the officers administering the public lands were bound by the regulations published May 6, 1836. 2 L. L. & O. 92. These regulations prescribed the mode of proceeding to vacate a fraudulent occupant entry, and were pursued in the case before the court.

This question has several times been raised and decided in this court, upholding the commissioner's powers. *Garland v. Winn*, (20 How. 8;) *Lytle v. The State of Arkansas*, (22 How.)

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For the reasons above stated, it is ordered that the decree of the circuit court be affirmed.

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WALTER LAFIN v. HERRINGTON and others.

1 Black, 326.

AGENCY—AFFIRMANCE—REDEMPTION FROM SHERIFF'S SALE.

1. The agent and attorneys at law of a judgment creditor, having sold land of the judgment debtor and received a sheriff's certificate of the sale, which allowed by law a year for redemption, assigned the certificate to a party interested in the land, taking his note for the money. Held, that though this was without authority, yet, as the judgment creditor did not, when notified of it, disaffirm it positively, or order the note to be given up, and other circumstances showing his intention to abide by the sale, it was to be treated as ratified by him.
2. The failure to pay the note at maturity did not authorize either the original purchaser or his agent to sell any right or interest in the land after it had become valuable and a subject of speculation.

APPEAL from the circuit court for the northern district of Illinois. The case lies mainly in facts fully stated and considered in the opinion.

*Mr. Johnson* and *Mr. Burgess*, for appellant.

*Mr. Beckworth*, for appellees.

[ \* 328 ] \* Mr. Justice WAYNE delivered the opinion of the court.

We shall confine ourselves to such of the facts of this case as are sufficient to illustrate the point upon which we will decide it. Others have been insisted upon in the argument, but, in our opinion, they have no substantial bearing upon the merits of the controversy.

The complainant and the respondents have chosen to put their respective rights to the land in dispute upon the sale of it, to satisfy the judgment of Stuart against J. Herrington, each claiming the sheriff's certificate of sale by fair purchases, the former, however, charging that the purchase of the latter had been obtained by the fraud and circumvention of Augustus M. Herrington, their co-defendant, without accusing any of the rest of them with complicity in the transaction.

It is recited in the bill that a judgment had been recovered by William Stuart, in the year 1837, against James Herrington, for six hundred and forty-six dollars and seventy-two cents. That an execution issued upon it, within the year of its rendition, command-

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ing the sheriff to make the money out of the goods and chattels, lands and tenements of the debtor, and that the sheriff had returned it to the proper office, with the entry upon it, "that he could find no property of the defendant whereon to levy." This occurred in the lifetime of James Herrington. He died in the year 1839 intestate, leaving a widow and ten children.

The probate court of Kane county granted to his widow letters of administration upon the husband's estate. It is against her, as administratrix, and nine of these children, one of them being dead, and the Illinois Central Railroad Company, that this suit is brought. The answer of that company \*makes it un- [ \* 329 ] necessary to notice it further in this opinion, except in confirmation of the fact that, at the time it bought its interest in the land in controversy, and when the complainant bargained for his, it had become a subject of speculation.

Nothing was done for several years after the sheriff's return upon the execution, and the death of the debtor, to collect the debt.

But when it had been judicially determined that the debtor had died seized of the land in controversy, Mr. Stuart, the judgment-creditor, empowered his friend and brother-in-law, William H. Adams, to take such means as were necessary to subject the land to the payment of his judgment. Adams accepted the agency, and employed Messrs. Farnsworth and Burgess, attorneys at law, in the case. They conducted it with the knowledge of Adams of every thing which was done, and with the acquiescence of his principal, Stuart. The counsel served a notice upon the widow and administratrix of J. Herrington, informing her of the unsatisfied existence of the judgment, and that they would apply in three months, at the clerk's office, for an alias execution. They did so, and the execution was issued and levied upon the land. It was sold by the sheriff, in four parcels, for the aggregate sum of \$1,378 42, subject to a right of redemption in one year, by the payment of the sums due, with accruing interest and the costs. Mr. Burgess attended the sale at the request of Mr. Adams, and bid on the land to the amount of the execution and costs, in his name, for the benefit of his principal, Mr. Stuart.

Mr. Burgess, as counsel, directed the sheriff to make the certificate of sale to Mr. Adams, and that having been done, he received and retained it. The purchase and retention of the certificate of sale by Mr. Burgess was approved by Mr. Stuart, it being understood it was to remain in the hands of himself, and his partner, Mr. Farnsworth, subject to the right of redemption, or to an assignment of it to a purchaser, as Mr. Adams might direct.

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Shortly before the expiration of the time allowed by the law to redeem, Mr. Burgess told Mr. Adams that Augustus M. Herrington, one of the children of the judgment-debtor, and now [ \* 330 ] \* a respondent to this bill, wished to redeem the land by paying the amount due upon the certificate of sale, and wanted an assignment of it to himself. Mr. Adams directed Mr. Burgess to write the assignment. He did so, leaving a blank for the name of the assignee, and a figure wanting for the date of the year, which Mr. Adams signed, giving a direction to Mr. Burgess, the latter assuring him it should be observed, that the certificate, with the assignment upon it, should not be given up until the money had been paid.

Either late in January or early in February, 1836, Augustus M. Herrington went to the office of Farnsworth and Burgess, the latter not being in, and he stated to Mr. Farnsworth his desire to get further time than the last day of redemption for the payment of the money due upon the certificate of sale. To this application Mr. Farnsworth says: "Knowing that there had been some conversation to transfer the certificate to A. M. Herrington, and that there was an assignment in the office for that purpose, the transfer of the certificate was made to him upon his giving his note of hand and a due bill in payment, the note being antedated as of March the sixth, 1855, with interest at ten per cent., to be paid on the 1st of September, 1856, to Farnsworth and Burgess; the due bill being for one hundred dollars 'and a trifle over,' which was paid in a short time afterward, the amount of it being the fee due to Farnsworth and Burgess by Mr. Stuart, for their services in the case." Mr. Farnsworth filled up the blank in the assignment with the name of Herrington, added the figure 5 to give that year as the date of the note, and concluded it, contrary to the fact, with the words, "*for money actually loaned.*"

Mr. Farnsworth declares, in his evidence, that the transfer was made and the note taken in good faith, for the benefit of Mr. Stuart, and for no other purpose than to give to Herrington the ownership of the certificate.

Some days after it had been done, Herrington went to the office occupied by Adams and by Farnsworth and Burgess for the transaction of their respective businesses—that of Adams being to buy and sell land—when the transfer of the certificate to Herrington became the subject of conversation, both [ \* 331 ] \* of the counsel and Adams being present. Adams then said to them and to Herrington that he was satisfied with the arrangement, but that he being only an agent, he would write to his principal

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about it, and if he did not object to it, that he would not. He did write, and received a reply from Mr. Stuart, complaining of what had been done, which was shown to Mr. Herrington on the 5th of March, the day before the expiration of one year from the date of the sale of the land.

But whatever may have been his discontent with the arrangement, that letter and other testimony in the record show that Mr. Stuart did not then intend to disaffirm it, but was content to take the chances of the payment of Herrington's note; at the same time holding his counsel responsible for the debt, if the note should not be paid at its maturity. He also required from them the deduction of their commissions on the amount "collected or to be collected." No complaint was made again of Farnsworth's arrangement by the parties interested in it, until after Herrington's default in payment of the note.

Six months had intervened, when Herrington received a letter, with the signature of Farnsworth and Burgess, urging him to pay the note on account of a letter which they had received from their client, Mr. Stuart. The letter was sent to Herrington, with a request for its return. Burgess and Farnsworth are charged, in that letter, with having given the certificate to Herrington without the knowledge and against the consent of Adams, and in violation of the assurance given by Mr. Burgess, that it should not be parted with by him until the money had been paid. The writer then says, that he had written to Mr. Adams to employ at once some able and honest lawyer—if he shall have the luck to find one—to take immediate measures to settle the matter. And he concludes by telling his lawyers that his confidence, and that of Adams, had been abused, and that if he should be compelled to go to Chicago again on the business, he would expose the whole affair. Then it appears, that up to the date of that letter—six months after that of the previous letter—there had been no actual disaffirmance of Farnsworth's arrangement with Herrington for the certificate of sale; and that all the parties \*knew it had been trans- [\* 332] ferred by that arrangement, in virtue of Herrington's right to redeem the land, for the benefit of himself and his mother, and his brothers and sisters. Stuart, Adams, and their counsel continued to anticipate the payment of the note, and the latter were allowed to retain it for payment, without the dissent of Adams or his principal. But, after it was past due for more than a month, the counsel wrote to Herrington a singular letter, without taking notice of any of the other respondents to this bill. They say they "were under the necessity, owing to Mr. Stuart's refusal to ratify

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the arrangement made by our Mr. F. with you about the certificate of sale of what is called the Lafin property, to refund the money you paid to Mr. F., about the 28th of January last, of \$108 34, with interest, amounting to \$116 48." Still, Burgess, acting as counsel of Stuart, in writing the letter just read, which was done with the full knowledge of Adams, made no offer to surrender Herrington's note.

The case subsequently shows, that the note was retained by Mr. Burgess, for the security of himself and partner against any claim which might thereafter be made by Mr. Stuart upon them for the money due him, in the event of his successfully carrying into execution his menace to make them responsible for the debt, and with the further intention to use the note to coerce the payment of it out of the land. By this time, however, the land was supposed to have become a good object of speculation. Mr. Burgess and Mr. Adams knew it to be so; for, before the letter had been written to Herrington, announcing to him, for the first time, that Mr. Stuart would not ratify their arrangement for the transfer of the certificate to A. M. Herrington, Mr. Burgess had already become the lawyer of the complainant, Mr. Lafin, for the purchase of the land, with the intention to divest the respondents of all right to the certificate of sale. We think that a moment's professional consideration, unaffected by any resentment of Mr. Burgess against Herrington for the non-payment of his note, would have suggested to him that having himself fully assented to what he represented as his partner's arrangement for the transfer of the certificate, that, [ \* 333 ] so far as he was concerned, it had given to the \*Herringtons an equity to the land, which it might not be professionally becoming in him to attempt to defeat, by his agency for the purchase of it for another person. He must have known that, under the circumstances, equity would coerce the respondents to pay the amount due upon the certificate, as the condition upon which they could ever get the sheriff's title to the land. Moreover, he knew that there were then persons offering to buy the land, at a larger sum than the certificate called for, amply securing his principal, Mr. Stuart, and himself and his partner, from all loss. And, further, he might have concluded that any one purchasing, either from Mr. Stuart or Mr. Adams, with a full knowledge of all the circumstances of the transaction before he bought, could not acquire any right in himself, by the purchase, to defeat the previous equity which had been obtained by the representatives of the judgment-debtor, in the exercise of their legal right to redeem the land from the operation of the certificate of sale. The evidence also shows

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that the complainant, Mr. Lafin, knew all the particulars of the judgment; the subsequent proceedings upon it; the sale of the property to satisfy it; how the certificate of sale had been given by the sheriff, and to whom, and for what purpose; the subsequent assignment of it to A. M. Herrington, in behalf of himself and his father's family; the agency of his counsel, Mr. Burgess, in the whole affair; and the course of Mr. Stuart and Mr. Adams, in respect to it, when the former conveyed to the complainant his interest in the land.

In our opinion, there never was, either by Mr. Stuart or Mr. Adams, or by their counsel, any effective disaffirmance of the assignment of the certificate to Mr. Herrington; and if either of them meant to do so, we think that no act of theirs, either separately or conjointly, could, under all the circumstances, have defeated, in favor of Mr. Lafin, the previous equity to the land, which had been acquired by the respondents. Lafin stands in no better condition than Mr. Stuart did, when his equity in the certificate had been conveyed to others by those who represented him, for a consideration which they chose to retain, with his knowledge, if not strictly with his consent, in \* expectation of its payment, [ \* 334 ] until after the time when the right of the assignees of it to redeem the land had passed. The latter, by that course, might well have supposed, and as they did think, that they had an equity in the certificate, not liable to be annulled at the pleasure of those from whom they had acquired it, upon the plea that there had been a failure to pay the money on the day stipulated, and that its non-payment at that time, of itself revested Mr. Stuart with the original, but contingent equities to the land, which the purchase of it, at sheriff's sale, had given to the judgment-creditor. The non-redemption of the land would have made Mr. Stuart's right absolute, upon the expiration of the time allowed; but having made the certificate of sale the subject of speculation and sale before that day, with a postponement for the payment of the consideration of the transfer for a longer time, neither Mr. Stuart nor Mr. Adams, as his agent, can, with any propriety, be considered as having had a right to retain, at the same time, both Mr. Stuart's claims upon the land, if the money should not be punctually paid, and also their transferee's obligation to pay it when due. Indeed, we doubt, without intending ourselves to be finally concluded upon the point, as it has not been so decided by the courts of Illinois, if, under the law of Illinois giving to a debtor the right to redeem his land sold under execution, if even an agreement had been made between these parties, which did make the right to redeem conditional upon the payment of a consideration in money, after the time to redeem had

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passed, and that, if not then paid, that the creditor should have the right to exclude the debtor from doing so, whether a court of equity, if called upon to adjust the rights of the parties under such a contract, would not, in consideration of the intentions of the legislature in giving to debtors the right to redeem, feel itself bound to dispose of the case, by making the debtor pay the amount due, with interest, and all costs which might have accrued in the litigation.

But how, in addition to what has been said of the disability of Mr. Stuart to convey, at the time it was done, any right to the land to the complainant, and the latter's inability to obtain any such right, in consequence of his knowledge of the circumstances, [ \* 335 ] \* when he took Stuart's conveyance, there were incidents in this affair, happening subsequently to the assignment of the certificate to Herrington, produced by the course taken by the complainant and his counsel, Mr. Burgess, and by Mr. Adams and Mr. Smith, who now appears for the first time in this business, which are certainly not calculated to strengthen the complainant's claim to the certificate of sale against the better equity of the respondents.

The course taken by the complainant to get the ownership of the land was to buy it from Mr. Stuart, expecting, if he succeeded in doing so, that Mr. Adams, having no interest or claim upon it, would, as Stuart's agent, transfer to him the certificate of sale which the sheriff made in his name, only, *as he says in his testimony*, for the benefit of Stuart. The case, however, shows that Mr. Adams would not or did not do so, and that he assumed, in eight days afterwards, and when he knew that his principal had conveyed to Laffin, to be the owner of the certificate, and conveyed the same land to Julius C. Smith, authorizing him to receive a deed for it, in his own name and to his own use, from the sheriff, in virtue of the certificate of sale, and then remitted himself to Mr. Stuart sixteen hundred dollars, the consideration which Laffin was to have paid Mr. Stuart, but which had not been done, though said in the deed that it had been.

Now, there are certain facts in connection with Stuart's deed to Laffin and Adams's to Smith which must be mentioned, and particularly so, as they are mostly derived from the testimony of Mr. Adams:

1. Mr. Burgess acted as the agent of Walter Laffin, the complainant, in the negotiation between Smith and Laffin, for the purchase of the property, and for the procurement of the deed from Stuart to Laffin. "Do not recollect who informed him so, but thinks it was Mr. Burgess."



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Laffin v. Herrington.

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2. The deed from Mr. Adams to Smith was executed, the latter being acquainted with the dispute that had arisen concerning the property and with the circumstances attending the transfer of the certificate to the Herringtons.

3. Smith knew when Adams made his deed, and when he \*accepted it, that Adams was only the agent of Stuart; [\* 336] that he had nothing in the land to convey; that the certificate of sale, which he was then professing to sell him, had been issued to him only as the agent and for the benefit of Stuart; that it had been already assigned, with his signature, to A. M. Herrington, and when the deed was made to Smith, on the 9th of October, that both himself and Adams were then aware of the fact of Stuart having sold his interest in the land to Laffin on the 1st of the same month. The title to the land, then, as between Stuart, Laffin, Adams, and Smith, stood thus: that the second had the first title to it, and the latter, that of Mr. Adams, the agent of Stuart, who had not at the time any property in the land, or any delegated authority from Stuart to convey it to Smith. We know not what were the inducements of Mr. Adams to make a transfer, under such circumstances, to Smith; but when he gave his testimony in this case, it would have been better for all parties concerned if he had given a full explanation of the transaction. It was, however, not done. But Smith accepted the conveyance, and brought a suit against Augustus M. Herrington and others for the property; and he states in his bill, that William H. Adams, for a valuable consideration *paid, and agreed to be paid*, had assigned the certificate to him. His suit was filed two days after the date of the conveyance to him. Thus matters stood until the 20th November of the same year, just one month, when he conveys the property to Walter Laffin, the complainant, for the sum of thirty thousand dollars, for which he had agreed to give sixteen hundred, the exact sum which Adams remitted to Stuart when he conveyed to Smith. Our object in giving the narrative of the transfers of this land has not been to ascertain whether all of the persons who have been mentioned were in combination to divest the Herringtons of their equity in it, but to show the fact that there was such a combination for speculation, which a court of equity will not countenance. The conveyances to Laffin and Smith were made by Mr. Stuart and Mr. Adams before the letter of the 23d of October, 1856, was written to A. M. Herrington by Farnsworth and Burgess, letting him know that Mr. Stuart \*had refused to ratify their [\* 337] arrangement for the transfer to him of the certificate of sale. Mr. Smith's suit was also brought before that letter was

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Lafin v. Herrington.

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written. Mr. Burgess had negotiated the sale from Stuart to Lafin on the first of October, and in that letter, of the 23d of the month, calls the land, for the first time, the Lafin property.

Mr. Burgess also knew that Adams's transfer to Smith was executed on the 9th, and, as early as the 11th, he became the counsel of Smith in the suit against the Herringtons, notwithstanding he had before bought the property for Lafin, then being at the same time the counsel of Lafin and Smith, in respect to land for which they had to all appearance antagonistic claims, which was acquired through his agency, his situation as to each of those persons being known to Adams when the incidents occurred which have been just mentioned, and, of course, before the letter of the 23d of October was written to Herrington. Further, we find in the record proof of his representation of Lafin and Smith, and with their consent at the same time, in the fact that after Smith's suit had been allowed to stand for six weeks, that Smith consented to give a quit-claim deed for the land to Lafin, for which the latter was to pay thirty thousand dollars, and that the litigation between Smith and Herrington was immediately transferred to Lafin, under the professional direction of Mr. Burgess.

All the foregoing facts, in connection with the evidence that this land had then become very valuable, convince us that there was a combination to deprive the Herringtons of their equity in it, by using the fact of the note of A. M. Herrington not being paid at its maturity as a pretense for doing so. Mr. Allen, engaged in the real estate business, says that he knew the land; that he knew it as the property contested between Matthew Lafin and Herrington's heirs, and thirteen acres of it, running from State street to the lake, comprising what was known as the Herrington tract; that it had seven fronts—one on State street, two on Wabash avenue, two on Michigan avenue, and two on Indiana; he thinks that in each front there was about six hundred feet, and that its value in March, 1856, was one hundred and twenty-five dollars per front foot.

[ \* 338 ] \* That may have been an exaggerated estimation; but whether so or not, it serves to show, especially as it was not controverted as to the amount, that all the persons concerned in defeating the equity of the Herringtons—and they were also dealers in land—were in combination to effect that object for a speculation, and that Mr. Burgess gave to them his professional services to accomplish it. Now, it is not meant by us, that the buying of land with the expectation of selling it at an advance in price is wrong of itself, any more than that the purchase of mer-

chandise is so, when made by the anticipation of its rise by the happening of political events, or by foresight of what will be the demand for consumption at a future day, and a deficiency of supply; but the difference between them is, that the latter is a triumph of sagacity, which gives life and energy to all trade; but that to buy land for speculation, upon a combination to divest the right of another of it, is a contrivance to fulfill the designs of selfishness.

We have given the facts of this case plainly, in connection with the assignment of the certificate of sale to Herrington, and the subsequent attempts which were made to divest his interest and that of his family in it, and necessarily with the names of all the persons concerned in them. That of Mr. Burgess occurs frequently under circumstances that call for a further remark. We do not mean it to be inferred, from anything that has been said, that, in the combination to make the speculation out of the property, he had any prospective pecuniary expectation or interest in its results. There is no evidence of that in the record, and there is that he advocated zealously the causes of his new clients—perhaps from temperament of character, perhaps from resentment to the Herringtons for the non-payment of the note at its maturity, which A. M. Herrington had given to Farnsworth and himself for the certificate of sale; but, be that as it may, we think, considering what had been the relations between himself and partner with A. M. Herrington in this matter, in appearing in court against him and his family for others in the same business, that he was not sufficiently mindful of the restraints imposed by prudence upon lawyers in making engagements with their clients, \* which cannot [\* 339] be disregarded without subjecting them to misconception and suspicion, and the profession to the already too prevalent impression that it is not practised with all the forbearances of the strictest honesty or of the highest moral principle.

With these views, we shall direct the judgment of the court below to be affirmed.

We ought to have said, also, that there was no error in receiving the letter of Mr. Stuart to Farnsworth and Burgess as evidence, complaining of their want of fidelity as his lawyers. It was not confidential, or meant to be so, in the sense of its having any connection with the merits of the case, for Mr. Stuart had authorized it to be communicated to another lawyer, for the purpose of obtaining from Farnsworth and Burgess an immediate settlement of the debt.

## THE UNITED STATES, Appellants, v. COVILLAND and others.

1 Black, 339.

## CALIFORNIA LAND GRANTS.

1. Where a Mexican title is confirmed to the original grantee, it inures to the benefit of any previous assignee or grantee of a part or of the whole from him, and when the patent is issued to him on the survey the assignee or grantee may assert his right in a court of equity.
2. But such assignee or grantee cannot have a separate and distinct confirmation by the commissioner of his part of the original grant when the whole has been confirmed to the original grantee.

APPEAL from the district court of California. The case is stated in the opinion.

*Mr. Stanton*, for the United States.

*Mr. Crittenden*, for appellees.

[ \*341 ] \*Mr. Justice CATRON delivered the opinion of the court.

Covilland and four others petitioned to have confirmed to them two tracts of land, as joint owners, assuming to derive title from John A. Sutter. His claim was confirmed for eleven leagues by the decision of this court, in 1858, and which judgment is reported in 21 How. 170. It appeared, in that case, that Sutter had assigned to others a great portion of his original grant; nevertheless, the suit against the United States seeking a confirmation was prosecuted in his name, regardless of that fact.

That a confirmation in the name of the original grantee, divesting the legal title of the United States, is binding on the government and on the assignees, is the established doctrine of this court. It was so held in the case of Percheman, (7 Peters, 56,) which decision has been adhered to, and was recognized in Sutter's case, (21 How. 182,) of which this case is, in fact, a part.

To this course of decision the courts adjudicating titles to lands situate in California are requested to conform by the 11th section of the act of March 3, 1851; nor can their decisions affect injuriously the rights of assignees. The 15th section of the act so provides.

[ \*342 ] \*The decree made by this court in 1858, in favor of

Sutter, remanded the proceeding to the surveyor general's office in California, to have a survey made of the land conformably to our decree, to the end of having a patent founded on the survey, divesting the title of the United States. In executing the survey, Sutter's assignees may intervene and protect their rights, according to the act of June 14, 1860.

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Singleton v. Touchard.

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We are not aware that the survey has been executed ; but when it is finally completed, and a patent issued to Sutter, his assignees can assert their rights against him in the ordinary courts of the country. But the extraordinary tribunals, proceeding by force of the act of 1851, cannot order a second patent to issue for a portion of Sutter's grant. Such judgment could have no effect against the government; and as between Sutter and the petitioners, would be a nullity, being prohibited by the 15th section of the act of 1851.

It is ordered that the judgment be reversed, and the petition be dismissed.

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JAMES SINGLETON and others, Plaintiffs in Error, v. GUSTAVE TOUCHARD.

1 Black, 342.

CALIFORNIA LAND TITLES.

1. The plaintiff in ejectment having produced a confirmation, survey, and patent from the United States for a Mexican grant, cannot be defeated by a Mexican claim still pending in the courts, though confirmed by the commissioners.
2. Such a claim, if valid, is but an inchoate equity, and cannot be made a defense to the legal title in the action of ejectment.

WRIT of error to the circuit court for the district of California. The case is stated in the opinion.

No counsel for plaintiff.

*Mr. Stanton, Mr. McCrea, Mr. Wilkins, and Mr. Hepburn, for defendants.*

\* Mr. Justice GRIER delivered the opinion of the court. [ \* 344 ]

There were two several instructions given by the court below to the jury. If either of them be correct, the verdict rendered for the plaintiff below was correct, and the judgment of the court thereon must be affirmed.

The plaintiff in ejectment claimed under a patent from the United States; the defendants under a claim confirmed by the district court, on which an appeal had been entered by the attorney general. This claim had not been surveyed; its boundaries were not officially ascertained, nor had any patent been issued for it.

The court instructed the jury, "that in the action of ejectment the legal title must prevail; that the plaintiff had a legal title by his patent, and the defendant's, if any, was but an inchoate and equitable title, which might avail in a court of chancery, but it could not avail the defendant in action of ejectment."

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Clagett v. Kilbourne.

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This instruction was in exact accordance with numerous [ \* 345 ] \* decisions of this court, (see *Mezes v. Greer*, 24 How. 268,) and justified the verdict, even if there had been error in the other instructions given.

There is another and important question in the case. It relates to the nature of the title of a pueblo to its common or pasture lands, and whether, under the laws and customs of Spain and Mexico, the government of the colony could make valid sales within the boundaries of the common so claimed.

This question is now for the first time presented to this court. The defendants in error have filed their brief, containing an elaborate argument; but the plaintiffs in error have not furnished us any. As it is not necessary, to our judgment of affirmance of this case, to give any opinion on this point, we decline any examination of the question on an *ex parte* argument.

We may give, as an additional reason for this course, that the question depends on the local law, and on the history and custom of the Mexican government and the governors of California. And since the appeal in this case, it seems to have been adjudged by the local tribunals. (See *Hart v. Burnett*, 15 Cal. Rep. 544; and *Brown v. San Francisco*, 16 Cal. Rep. 452.)

This decision of a question of local law by these domestic tribunals may well have been considered by the plaintiffs in error as a sufficient reason for abandoning his case without argument here.

Judgment of the district court affirmed.

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THOMAS W. CLAGETT, Plaintiff in Error, v. KILBOURNE.

1 Black, 346.

PARTNERSHIP IN LANDS—EXECUTIVE SALE OF PARTNER'S INTEREST.

1. The members of a joint stock association for dealing in lands are partners; and the interest of one partner is subject to levy and sale, under execution, in the same manner and with like effect as partnership personal property.
2. In such case, the purchaser takes only the interest of the partner, subject to an accounting and adjustment of the partnership dealing.
3. Such a purchaser cannot maintain ejectment for the land. His remedy is by a bill in equity for a settlement of the affairs of the joint stock company, and perhaps for partition.

WRIT of error to the district court for the district of Iowa. The case is stated in the opinion.

*Mr. Geo. C. Dixon*, for plaintiff.

*Mr. Charles Mason* and *Mr. Gillet*, for defendant.

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Clagett v. Kilbourne.

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\* Mr. Justice NELSON delivered the opinion of the court. [ \* 346 ]

This suit is an ejectment by Clagett to recover from the defendant an undivided one-sixth of certain parcels of land situate in the county of Lee, and State of Iowa. The plaintiff claims under a sheriff's deed of the property on a sale under a judgment and execution against one Isaac Galland. The principal question in the case turns upon the effect of this sale and conveyance to pass the title to the purchaser.

An association or joint stock company was formed in 1836 by several persons, in which Isaac Galland, the judgment \* debtor, was a member, for the purpose of dealing in the [ \* 347 ] purchase and sale of lands in the State of Iowa, then the territory of Wisconsin, lying between the Mississippi and Des Moines rivers, known as the Half-breed tract.

By the articles of association, the lands purchased were to be conveyed to certain trustees named, to hold as joint tenants in trust, for the benefit of the persons composing the association. The stock or capital was divided into forty-eight shares, and held in unequal parts by the stockholders representing the moneys paid into the association. Isaac Galland was the owner of 8-48 or one-sixth of the whole.

The articles stipulated that the trustees should purchase the lands situate as above stated, cause them to be surveyed, lay out sites for towns, villages, and cities, as they might deem eligible, and cause the property to be examined in respect to water power and hydraulic privileges, and lay out the same with reference thereto. The trustees were also authorized to sell and convey any part of the lands purchased, and take such securities for the purchase money as they might deem fit, make contracts, and do all lawful acts necessary and proper to carry into effect the objects of the association.

It is then stipulated that the purchase money, and the costs of the improvements, taxes, assessments, &c., were to be charged on the property, and paid out of the first proceeds of the sales; and that the proceeds, after paying all expenses, charges, improvements, disbursements, &c., should be applied to the repayment of the purchase money until the whole amount be paid.

They were to keep regular books of account, in which all the purchases, sales, and proceedings, in respect to the property, should be kept, and semi-annual accounts were to be rendered to the associates; and that, when the trustees should have realized money enough from the sales, and other disposition of the property, to satisfy all the purchase money, improvements, interest, taxes, assess-

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ments, &c., their power to sell said property should cease, and a division of the lands and moneys belonging to the association, if any, made upon the stockholders.

[ \* 348 ] \* The lands were to be divided into two classes: the first to include sites of towns, villages, and cities, and hydraulic privileges; the second should embrace the residue of the property, and each class to be divided into forty-eight shares, the original number of shares of the association.

It appears from the bill of exceptions that, in 1841, partition was made of the half-breed tract among the proprietors, and that the trustees of this association drew shares in the tract, among others, numbered 43, 56, 84, and 93.

The judgment against Isaac Galland was recovered in 1843, and the sale took place in 1851. The sheriff's deed is dated in 1852. The lots of which 8-48 parts or one-sixth were sold, and to recover the possession of which this suit is brought, were included in the shares above mentioned, and represent the interest of Galland, as claimed, in the several lots. It was admitted that the defendant was in possession of these lots, and that he claimed titles under deeds from the trustees of the association.

The evidence being closed, the counsel for the defendant took objection to the admissibility of the judgment and sale, on the ground that Marsh, Lee, and Delevan, the trustees, were the sole owners of the land under the partition and decree; and that Isaac Galland had no legal title to the same, upon which the judgment could operate as a lien, or be sold on execution, and the court excluded the judgment, execution, and sale.

The joint stock company, of which the judgment debtor in this case was a member, constituted a partnership for the purpose of dealing in real estate; and the law governing the rights of creditors, representing the separate debts of a partner, must determine the rights of the plaintiff. The judgment was for the individual debt of Galland, and is sought to be enforced against the partnership funds.

The proceedings for this purpose assume that the share of the judgment debtor in the association is an interest in the lands; and though legal title be in the trustees, is liable to be seized on the execution and sold, and the purchaser put in possession.

[ \* 349 ] \* The settled law is otherwise. We do not deny but that the execution may be levied on the joint property, with the view of reaching the undivided interest of the judgment debtors; but in such case the levy is not upon his individual share, as if there were no debts of the partnership, or lien on the same, for the



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balance due to the other partners. It is upon the interest only of the judgment debtor, if any, in the property, after the payment of all the partnership debts, and other charges thereon. The purchaser takes the same interest in the property which the judgment debtor would have upon a final adjustment of all the accounts of the partnership. It is not only an undivided, but an unascertained interest, and the purchaser is substituted to the rights and interests of the judgment debtor in the property sold. Neither does the sale transfer any part of the joint property to the purchaser, so as to entitle him to take it from the other partners; for that would be to place him in a better situation than the partner (judgment debtor) himself.

The remedy of the purchaser is, to go into equity and call for an account, and thus entitle himself to the interest of the judgment debtor, if any, after the settlement of the partnership liabilities.

The fact that the property in this case consists of real estate, does not change the principles of law governing the ultimate rights and interests concerned. The real property belonging to the partnership is treated in equity as part of the partnership fund, and is disposed of and distributed the same as the personal assets.

In this case the legal title is in the trustees, who are bound to account to the stockholders the *cestuis que trusts*, according to their respective shares, after all debts of the association have been discharged. The equity of the judgment creditor is the interest in the land, after a sufficient portion of it has been disposed of for this purpose.

It is quite clear the plaintiff has mistaken his remedy, as he obtained no title, legal or equitable, to the particular lots in question.

It is proper to add, even if an equitable title had been acquired, it would not have helped him, as it will not sustain an ejectment in the federal courts. (23 How. 235, 249; 21 ib. 481.) [\* 350]

There are other questions discussed by the learned counsel for the respective parties; but as the examination of them is not material to the decision of the case, we forbear noticing them.

Judgment affirmed.

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Farney v. Towle.

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## FARNEY, Plaintiff in Error, v. TOWLE.

1 Black, 350.

## JURISDICTION OVER STATE COURTS.

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In a writ of error to a State court jurisdiction does not exist here unless it appears that the point relied on was raised and decided in the State court; that its attention was called to the particular clause of the constitution of the United States on which the party relied, and to the right he claimed under it; and that with the question thus distinctly presented, the decision was against him.

WRIT of error to the superior court of the city of New York.  
The case is presented in the opinion.

*Mr. David Dudley Field*, for plaintiff.

*Mr. Ellingwood*, for defendant.

[ \* 350 ] \* Mr. Chief Justice TANEY delivered the opinion of the court.

This is a writ of error to the superior court of the city of New York, and the error assigned is that the court maintained the validity of a statute of that State by which new trustees had [ \* 351 ] been substituted in place of \* those appointed by a testator, and authorized to carry into execution the trusts created by the last will of the deceased. And the plaintiff in error alleges that this law was a violation of that article of the constitution of the United States which declares that "no State shall pass any law impairing the obligation of contracts."

But no such point appears to have been raised in the State court, and this article in the constitution does not appear to have been even referred to or noticed in any part of the proceedings. The answer of the plaintiff in error, it is true, charges in general terms that the law was unconstitutional and void; but from the context it would seem that this charge was applied to the constitution of the State rather than to that of the United States; and even if it could be construed as applying to the latter, it has repeatedly been declared by this court, as will appear by the reports of its decisions, that in order to give it jurisdiction, it must appear that the point was raised and decided in the State court; that the attention of the court was called to the particular clause of the constitution of the United States upon which the party relied, and to the right he claimed under it; and that, with the question thus distinctly presented, the decision was against him.

This writ of error must, therefore, be dismissed for want of jurisdiction.

## CREWS and SHERMAN, Appellants, v. BURCHAM and others.

1 Black, 352.

## INDIAN TITLE IN RESERVE OF TREATY.

1. A reservee under the treaty with the Pottawatomie Indians of 1832 has an inchoate equitable title to the land reserved, and though its locality is only ascertained after the President shall have located and designated it, it is still subject to valid sale and assignment by the reservee.
2. Where the patent issues in such case to the reservee from the United States during the life of the grantee it inures to the benefit of his assignee or grantee, and if after his death, the same result follows, under the act of May 20, 1836. 5 U. S. Stats. 31.
3. Though the legal title be in complainant in a bill in chancery, it can be maintained to quiet title, to relieve it of clouds, and to prevent multiplicity of litigation.
4. The question whether the land as patented lies within the original treaty lands, cannot be raised by any one but the United States.
5. Purchasers from the heirs of the reservee cannot claim to be innocent purchasers without notice when the deed of reservee was on record.
6. *Doe et al. v. Wilson*, 23 How. 457, (3 Miller, 654.) commented on and explained.

APPEAL from the circuit court for the northern district of Illinois.  
The case is well stated in the opinion.

*Mr. Armington* and *Mr. Baxter*, for appellants.

*Mr. Carlisle* and *Mr. Niles*, for appellee.

\* Mr. Justice NELSON delivered the opinion of the court. [ \* 355 ]

This bill was filed by the appellees, the complainants below, against the defendants, to enjoin a suit at law to recover a part of fractional section 24, in township 31, Illinois. By a treaty with the Pottawatomie tribe of Indians of October 27, 1832, the nation ceded to the United States all their lands in Illinois and other States, subject to certain reservations, for which patents were to be issued. Provision was made in the treaty, that the reservations should be selected under the direction of the president of the United States, after the land was surveyed, and the boundaries should correspond with the public survey. Francis Besion, a member of the tribe, was a reservee of one half section of land under this treaty. As we have said, the treaty bears date 27th October, 1832. On the fourth of February following, Besion conveyed, for a valuable consideration, all his right and interest in the half section to William Armstrong, under whom the complainants below derive their title. The selection of the half section was made by the president, in pursuance of the treaty, and a patent was issued on the 17th February, 1845, for the same, to Besion and his heirs, with an habendum clause, "to have and to hold the said tract,

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Crews v. Burcham.

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with the appurtenances, unto the said Francis Besion, his heirs and assigns." Besion died in 1843, before the issuing of the patent. The defendants set up a title to the tract under conveyances from the heirs of the reservee, claiming that the deed from him to Armstrong carried with it no right or title to the half section, [ \* 356 ] which was subsequently \*selected and patented. The decree of the court below was in favor of the complainants, enjoining the suit at law, and restraining the institution of others for the purpose of quieting the title.

The main and controlling questions involved in this case were before this court in the case of *Doe et al. v. Wilson*, reported in 23 How. 457, which arose under a reservation in this treaty in behalf of the chief, Pet-chi-co.

It was there held, that the reservation created an equitable interest to the land to be selected under the treaty; that it was the subject of sale and conveyance; that Pet-chi-co was competent to convey it; and that his deed, upon the selection of the land and the issue of the patent, operated to vest the title in his grantee.

It is true that no title to the particular lands in question could vest in the reservee, or in his grantee, until the location by the president, and, perhaps, the issuing of the patent; but the obligation to make the selection as soon as the lands were surveyed, and to issue the patent, is absolute and imperative, and founded upon a valuable and meritorious consideration. The lands reserved constituted a part of the compensation received by the Pottawatomies for the relinquishment of their right of occupancy to the government. The agreement was one which, if entered into by an individual, a court of chancery would have enforced by compelling the selection of the lands and the conveyance in favor of the reservee, or, in case he had parted with his interest, in favor of his grantees. And the obligation is not the less imperative and binding, because entered into by the government. The equitable right, therefore, to the lands in the grantee of Besion, when selected, was perfect; and the only objection of any plausibility is the technical one as to the vesting of the legal title.

The act of congress, May 20, 1836, (5 U. S. St. 31,) provides, "that in all cases where patents for public lands have been or may hereafter be issued in pursuance of any law of the United States, to a person who had died, or who shall hereafter die, before [ \* 357 ] the date of such patent, the title to the land \*designated therein shall inure to, and become vested in, the heirs, devisees, or assigns of such deceased patentee, as if the patent had issued to the deceased person during life."

We think it quite clear, if this patent had issued to Besion in his lifetime, the title would have inured to his grantee. The deed to Armstrong recites the reservation to the grantee of the half section under the treaty, and that it was to be located by the president after the lands were surveyed; and then, for a valuable consideration, the grantee conveys all his right and title to the same with a full covenant of warranty. The land is sufficiently identified to which Besion had the equitable title, which was the subject of the grant, to give operation and effect to this covenant on the issuing of the patent within the meaning of this act of congress. The act declares the land shall inure to, and become vested in, the assignee, the same as if the patent had issued to the deceased in his lifetime.

The warranty estops the grantee, and all persons in privity with him, from denying that he was seized. The estoppel works upon the estate, and binds the after-acquired title as between parties and privies. (11 How. 325; 21 ib. 228.)

Some expressions in the opinion delivered in the case of *Doe v. Wilson*, the first case that came before us arising out of this treaty, were the subject of observation by the learned counsel for the appellant in the argument, but which were founded on a misapprehension of their scope and purport. It was supposed that the court had held that the reservee was a tenant in common with the United States after the treaty of cession, and until the surveys and patent. It will be seen, however, that the tenancy in common there mentioned referred to the right to occupy, use, and enjoy the lands in common with the government, and had no relation to the legal title.

An objection was taken, that a portion of the half section embraced in the patent to Besion did not lie within the district of country ceded by the treaty. The same objection was taken in the case of *Doe v. Wilson*, and the answer given was, the recitals in the patent, that the sections were those selected by the president, and to which the reservee was entitled under the treaty, were conclusive on the point; and we may add, that \*cer- [ \* 358 ] tainly no third party has any right to complain, if the facts were as alleged.

An objection was also taken, that if the complainants held the legal title to the premises in question, their remedy was at law, and not in equity. But the answer is, that the bill was filed by the complainants, among other things, to relieve their title from the embarrassment of the adverse claims set up under the deeds from the heirs of Besion, and also to restrain a multiplicity of

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Rice v. The Minnesota and Northwestern Railroad Co.

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suits. It appears that a portion of the land has been laid out in town lots, which are held under the complainants' title.

A further objection was taken, that the defendants are *bona fide* purchasers for a valuable consideration. But the answer is, that the deed from Besion to Armstrong, which referred specially to this reserved right to the half section, was duly recorded before the purchase of the defendants; and, besides, those deriving title under this deed to Armstrong were in possession of the tract, claiming title to the whole at the time, which operated as notice to the subsequent purchasers.

The decree of the court below affirmed.

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EDMUND RICE, Plaintiff in Error, v. THE MINNESOTA AND NORTH-  
WESTERN RAILROAD COMPANY.

1 Black, 360.

CONSTRUCTION OF CONGRESSIONAL RAILROAD GRANT.

1. An act of the Territorial legislature incorporating a railroad company and granting it lands which congress might thereafter grant to the territory to aid in building such a road, is not a binding and valid grant as against the State.
2. A grant of lands to a State or territory, for the purpose of building a railroad, which contains a provision "that no title shall vest in said territory, nor shall any patent issue for any part of the lands heretofore mentioned, until a continuous length of twenty miles of said road shall be completed through the lands hereby granted," is not a grant in *presenti*, and no title passes until the terms are complied with.
3. It is competent for congress to repeal such an act absolutely before any road is built under it, and with the repeal falls all claims of the territory or any under her to the lands.

WRIT of error to the district court for the district of Minnesota.  
The case is fully stated in the opinion.

*Mr. Noyes* and *Mr. Barbour*, for plaintiffs.

*Mr. Stevens*, for defendants.

[ \* 369 ] \*Mr. Justice CLIFFORD delivered the opinion of the court.

This is a writ of error to the district court of the United States for the district of Minnesota, bringing up the record of a suit transferred into that court from the supreme court of the territory.

According to the transcript, the suit was commenced by the present plaintiff on the first day of November, 1856, in the district court for the county of Dakota, before the territory was admitted

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as a State. It was an action of trespass; and the complaint contained two counts, each describing a distinct tract of land as the close of the plaintiff. Both tracts, however, as described, comprised a certain part of township number one hundred and fourteen north, of range nineteen west, situate in the county where the suit was brought; and the several acts of trespass complained of were alleged, in each count, to have been committed on the twenty-fifth day of October, prior to the date of the writ.

Service was duly made upon the corporation defendants, and they appeared, and made answer to the suit. Whenever the answer to the suit extended beyond the mere denial of the allegations of the complaint, the law of the territory required that it should contain "a statement of the new matter constituting the defense or counter claim;" and the defendants \*framed [ \*370 ] their answer, in this case, in conformity to that requirement.

Among other things, they admitted, in the answer, that the plaintiff claimed title to the premises under the United States, by purchase and entry, made on the first day of January, 1856; but averred that they were incorporated by the territorial legislature on the fourth day of March, 1854, and set up a prior title in themselves, under the provisions of their charter, and an act of congress passed on the twenty-ninth day of June, in the same year.

Responding to that claim, the plaintiff replied, that the act of congress referred to in the answer was repealed on the fourth day of August of the same year in which it was passed.

To that replication the defendants demurred, showing, for cause, that the act of congress last named was void, and of no effect.

Judgment was entered for the plaintiff in the county court; and thereupon the defendants appealed to the supreme court of the territory, where the judgment of the county court was reversed; but no final judgment in the cause was ever entered in that court.

Pursuant to the act of congress admitting the territory as a State, (11 Stat. at Large, 285,) the record of the suit was then transferred to the district court of the United States created by that act; and the latter court, on the nineteenth day of November, 1858, after supplying an omission in the record of the county court, entered a final judgment in favor of the defendants. Whereupon the plaintiff sued out a writ of error, and removed the case into this court.

Possession of the premises having been in the plaintiff at the time the supposed trespasses were committed, and the several acts of trespass complained of being admitted, the controversy must turn

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upon the sufficiency of the title set up by the defendants. They were incorporated by the territorial legislature on the fourth day of March, 1854, as alleged in the answer. Their charter empowered them, among other things, to survey, locate, and construct [ \* 371 ] a railroad from the line of the \*State of Iowa to Lake Superior. Authority was also given to the company, in the charter, to secure, in the manner therein pointed out, a right of way for the contemplated railroad, two hundred feet in width, through the entire length of the described route. For that purpose they might purchase the land of the owner, or might enter and take possession of the same, upon paying proper compensation. And the charter also contained the following provision: All such lands \* \* \* and privileges belonging, or which may hereafter belong, to the territory or future State of Minnesota, on and within said two hundred feet in width, are hereby granted to said corporation for said purposes, and for no other; and for the purpose of aiding the said company in the construction and maintaining the said railroad, it is further enacted, that any lands that may be granted to the said territory, to aid in the construction of the said railroad, shall be, and the same are hereby, granted in fee simple, absolute, without any further act or deed. Provision was also made for such further deed or assurance of the transfer of the said property as said company might require, to vest in them a perfect title to the same; and to that end, the governor of the territory or future State was authorized and directed, "after the said grant of land shall have been made" to the territory by the United States, to execute and deliver to said company such further deed or assurance, in the name and in behalf of said territory or State, but upon such terms and conditions as may be prescribed by the act of Congress granting the same.

These references to the act of incorporation will be sufficient, in this connection, except to say, that the incorporators named in the first section held a meeting within the time specified in the act, and voted to accept the charter, and gave notice of such acceptance, as therein required. They also chose a committee, to call future meetings for the organization of the company, and authorized the committee to open books and receive subscriptions for one million dollars of the capital stock. Books of subscription were accordingly opened, under their direction, on the first day of May, 1854, and on the twentieth day of the same month subscriptions were [ \* 372 ] made to the amount \*of two hundred dollars, of which an installment of ten per cent. was duly paid by the subscribers. Congress, on the twenty-ninth day of June, 1854, passed



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the act entitled "An act to aid the territory of Minnesota in the construction of a railroad therein," which is the act of congress referred to in the answer of the defendants. (10 Stat. at Large, p. 302.)

Assuming the allegations of the answer to be correct, subscriptions to the capital stock of the company were made on the following day to the amount of one million of dollars, and an installment of ten per cent. upon each share so subscribed was duly paid to the committee. Having complied with the conditions of the charter in these particulars, the subscribers to the stock, in pursuance of previous notice given by the committee, met in the city of New York, on the first day of July in the same year, and completed the organization of the company, by the election of twelve directors, and such other officers as were necessary under their charter to effect that object.

Reference will now be made to the act of congress set up in the replication of the plaintiff, in order that the precise state of facts, as they existed on the fourth day of August, 1854, when the repealing act was passed, may clearly appear.

By that act it was in effect provided, that the bill entitled "An act to aid the territory of Minnesota in the construction of a railroad," passed on the twenty-ninth day of June, 1854, be, and the same is hereby, repealed. (10 Stat. at Large, 575.) Repealed as the act was at the same session in which it was passed, the defendants had not then procured the amendments to their charter set up in the answer, nor had they then commenced to survey, locate, or construct the railroad therein authorized and described. They had completed the organization of the company under their original charter, at the time and in the manner already mentioned; but they had done nothing more which could have the remotest tendency to secure to them any right, title, or interest in the lands described in the complaint. One of the amendments to their charter, set up in the answer, was passed by the territorial legislature on the seventeenth day of February, 1855, and the other on the first day of March, 1856—more than a year and a half after the act of \*congress in question had been repealed. [ \* 373 ] Survey of the route and location of the railroad were made on the twentieth day of October, 1855; and the defendants admitted that the location included the parcels of land in controversy, and that they went upon the same at the time alleged, and cut down and removed the trees from the track of the railroad, as alleged in the complaint.

Most of the facts here stated are drawn from the answer of the

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defendants; but, inasmuch as the pleadings resulted in demurrer, and the replication did not controvert the allegations of the answer, it must be assumed that the facts stated in the answer are correct.

Looking at the statement of the case, it is quite obvious that two questions are presented for decision of very considerable importance to the parties; but in our examination of them we shall reverse the order in which they were discussed at the bar. Briefly stated, the questions are as follows:

First. Whether the defendants acquired any right, title, or interest in the lands in controversy, by virtue of the provisions of their charter, as originally granted by the territorial legislature; and if not, then,

Secondly. Whether the territory, as a municipal corporation, by the true construction of the act of congress set up in the answer, acquired, under it, any beneficial interest in the same, as contradistinguished from a mere naked trust or power to dispose of the land, in the manner and for the use and purpose described in the act?

Argument is not necessary to show that those questions arise in the case, because, if the defendants acquired such a right, title, or interest in the lands, under their original charter, then it is clear that it became a vested interest as soon as the act of congress went into effect; and on that state of the case it would be true, as contended by the defendants, that the repealing act set up in the replication of the plaintiff is void, and of no effect. *Terret v. Taylor*, (9 Cran. 43;) *Pawlet v. Clark*, (9 Cran. 292.)

But the determination of that question in the negative does not necessarily show that the plaintiff is entitled to prevail in [ \* 374 ] \*the suit, because, if the legal effect of the act of congress set up in the answer was to grant to the territory a beneficial interest in the lands, then it is equally clear that it was not competent for congress to pass the repealing act, and divest the title; and the defendants, on the facts exhibited in the pleadings, although they did not acquire any title under their original charter, are, nevertheless, the rightful owners of the land, by virtue of the first amendment to the same, passed by the territorial legislature. Unless both of the questions, therefore, are determined in the negative, the judgment of the court below must be affirmed. *Fletcher v. Peck*, (6 Cran. 135.)

It is insisted by the defendants that their original charter, or that part of it already recited, operated as a valid grant to them of all the lands thereafter to be granted by congress to the territory, and that the charter took effect as a grant, so as to vest the title in the company the moment the act of congress was passed. But it is

very clear that the proposition cannot be sustained, for the reason that both principle and authority forbid it. Grants made by a legislature are not warranties; and the rule universally applied in determining their effect is, that if the thing granted was not in the grantor at the time of the grant, no estate passes to the grantee. Even the defendants admit that such was the rule at common law; but they contend that the rule is not applicable to this case. Several reasons are assigned for the distinction; but when rightly considered, they have no better foundation than the distinction itself, which obviously is without merit.

One of the reasons assigned is, that there is no common law of the United States, and, consequently, that the rule just mentioned is inapplicable to cases of this description. Jurisdiction, in common law cases, can never be exercised in the federal courts, unless conferred by an act of congress, because such courts are courts of special jurisdiction, and derive all their powers from the constitution, and the laws of congress passed in pursuance thereof. Rules of decision, also, in cases within the thirty-fourth section of the judiciary act, are derived from the laws of the States; but in the construction of the laws of congress, the rules of the common law furnish the \*true guide; and the same remark applies [ \* 375 ] in the construction of the statutes of a State, except in cases where the courts of the State have otherwise determined.

Able counsel submitted the same proposition in the case of *Charles River Bridge v. The Warren Bridge*, (11 Pet. 545;) but this court refused to adopt it, and, in effect, declared that the rules for the construction of statutes in the federal courts, both in civil and criminal cases, were borrowed from the common law. See, also, 1 Story, *Com. on Con.*, (3d ed.,) sec. 158.

More direct adjudications, however, as to the validity of a grant where the title was not in the grantor at the time it was made, are to be found in the earlier decisions of this court. Three times, at least, the question has been expressly ruled, and in every instance in the same way. It was first presented in the case of *Polk's Lessee v. Wendell*, (9 Cran. 99,) and the court, Marshall, Ch. J., delivering the opinion, said that where the State had no title to the thing granted, or where the officer issuing it had no authority, the grant is absolutely void. Five years afterwards, the same case was again brought before the court, and the same doctrine was affirmed in the same words. *Polk's Lessee v. Wendell*, (5 Whea. 303.)

Notwithstanding those decisions, the question was presented to the court for the third time in the case of *Patterson v. Winn*, (11 Whea. 388;) and on that occasion this court, after referring to the

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previous decisions, said, we may therefore assume as the settled doctrine of the court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority or prohibited by statute, *or the State had no title*, it may be impeached collaterally in a court of law in an action of ejectment. Assuming the rule to be a sound one, it is as applicable to a grant by a territory as to one made by a State, and the cases cited are decisive of the point. Our conclusion, therefore, on this branch of the case is, that the defendants acquired no right, title, or interest in the lands in controversy by virtue of their original charter.

2. Having disposed of the first question, we will proceed to the consideration of the second, which involves the inquiry [\* 376 ] \* whether any beneficial interest in the lands passed to the territory under the act of congress set up in the answer. It is contended by the defendants, on this branch of the case, that the act of congress in question was and is, *per se*, a grant *in presenti* to the territory of all the lands therein described, and that a present right estate and interest in the same passed to the territory by the terms of the act. Reliance for the support of that proposition is chiefly placed upon the language of the first section. Omitting all such parts of it as are unimportant in this investigation, it provides "that there shall be, and is hereby, granted to the territory of Minnesota, for the purpose of aiding in the construction of a railroad, \* \* \* every alternate section of land, designated by odd numbers, for six sections in width on each side of said road within said territory, \* \* \* which land shall be held by the territory of Minnesota for the use and purpose aforesaid." Certain words in the clause are omitted, because they are not material to the present inquiry, and if produced, would only serve to embarrass the investigation. Standing alone, the clause furnishes strong evidence to refute the proposition of the defendants, that a beneficial interest passed *in presenti* to the territory; because it is distinctly provided that the lands granted shall be held by the territory for a declared use and purpose, evidently referring to the contemplated railroad, which, when constructed, would be a public improvement of general interest. Resort to construction, however, on this point is wholly unnecessary, because it is expressly declared in the second proviso that the land hereby granted shall be exclusively applied in the construction of that road for which it was granted, and shall be disposed of only as the work progresses; and the same shall be applied to no other purpose whatever. Beyond question, therefore, the lands were to be held by the territory only for the use and purpose of constructing the railroad described

in the act, and they were to be applied to that purpose and no other.

Passing over the residue of the section, and also the second section, as unimportant in this inquiry, we come to the third, which shows, even more decisively than the first, that the interpretation assumed by the defendants cannot be sustained.

\* Among other things, it provides, "that the said lands [\* 377] hereby granted *shall be subject* to the disposal of any legislature thereof for the purpose aforesaid, and *no other*; nor shall they inure to the benefit of any company heretofore constituted and organized." Such disposal of the lands could not be made under the previous legislation of the territory, for the reasons already assigned in answer to the first proposition of the defendants; and we may now add another, which is, that no such authority was conferred in the act of congress granting the land. Whether we look at the language employed, or the purpose to be accomplished, or both combined, the conclusion is irresistible that it was by future action *only* that the legislature was authorized to dispose of the lands, even for the purpose therein described; and it is clear, irrespective of the prohibitions hereafter to be mentioned, that they could not be disposed of at all for any other purpose, nor in such manner that they would inure to the benefit of any company previously constituted and organized. Much reason exists to conclude that the latter prohibition, notwithstanding the fact that the defendants were not then organized, includes their company; but, in the view we have taken of the case, it is not necessary to decide that question at the present time. Considered together, and irrespective of what follows, the first and third sections show that the lands were to be held by the territory for the declared use and purpose of constructing a specified public improvement; that they could not be disposed of at all under any previous territorial legislation, nor for any other purpose than the one therein declared, nor to any company falling within the prohibition set forth in the third section; but, restricted as the authorities of the territory were by those limitations and prohibitions, their hands were still more closely tied by the provisions of the fourth section, which remain to be considered.

By the fourth section it is provided, "that the lands hereby granted to the said territory shall be disposed of by said territory only in the manner following—that is to say, no title shall vest in the said territory of Minnesota, nor shall any patent issue for any part of the lands hereinbefore mentioned, \* until [\* 378] a continuous length of twenty miles of said road shall be completed through the lands hereby granted." Provision is also

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made for the issuing of a patent for a corresponding quantity of the lands when the secretary of the interior should be satisfied that twenty miles are completed, and so on till the whole was finished; and it also provides that, if the road is not completed in ten years, no further sale shall be made, and the lands unsold shall revert to the United States. Comparing the several provisions together, it is not perceived that they are in any respect inconsistent, and certainly they all tend more or less strongly to the same conclusion. Certain lands are granted to the territory by the first section, to be held by it for a specified use and purpose, to wit, for the construction of a specified public improvement, and to be exclusively applied to that purpose, without any other restriction, except that the lands could be disposed of only as the work progressed. To carry out that purpose, the lands were declared by the third section to be subject to the future disposal of the territorial legislature, but that, in no event should they inure to the benefit of any company previously constituted and organized. Neither of those sections contain any words which necessarily and absolutely vest in the territory any beneficial interest in the thing granted. Undoubtedly, the words employed are sufficient to have that effect; and if not limited or restricted by the context or other parts of the act, they would properly receive that construction; but the word grant is not a technical word like the word *enfeoff*, and although, if used broadly, without limitation or restriction, it would carry an estate or interest in the thing granted, still it may be used in a more restricted sense, and be so limited that the grantee will take but a mere naked trust or power to dispose of the thing granted, and to apply the proceeds arising out of it to the use and benefit of the grantor. Whenever the words of a statute are ambiguous, or the meaning doubtful, the established rule of construction is, that the intention must be deduced from the whole statute, and every part of it. (1 Kent's Com. 462.) Intention in such cases must govern when it can be discovered; but in the search for it the whole statute must be regarded, and, if practicable, [ \* 379 ] so expounded as to give \*effect to every part. That rule cannot be applied to this case, if it be admitted that a beneficial interest in the lands passed to the territory, because it is expressly provided by the fourth section of the act that no title shall vest in the territory of Minnesota, nor shall any patent issue for any part of the lands, until a continuous length of twenty miles of the road shall be completed. Unless that whole provision, therefore, be rejected as without meaning, or as repugnant to the residue of the act, it is not possible, we think, to hold that the territory

acquired a vested interest in the lands at the date of the act; and yet the fourth section contains the same words of grant as are to be found in the first and third, and no reason is perceived for holding that they are not used in the same sense. It is insisted by the defendants that the provision does not divest the grant of a present interest; that it only so qualifies the power of disposal that the territory cannot place the title beyond the operation of the condition specified in the grant. But they do not attempt to meet the difficulty, that, by the express words of the act, the absolute title remained in the grantor, at least until twenty miles of the road were completed; nor do they even suggest by what process of reasoning the four words, "no title shall vest," can be shorn of their usual and ordinary signification, except to say that it would be doing great injustice to congress to hold, notwithstanding the words of the first section, that no title passed to the grantee. Whether the provision be just or unjust, the words mentioned are a part of the act, and it is not competent for this court to reject or disregard a material part of an act of congress, unless it be so clearly repugnant to the residue of the act that the whole cannot stand together. On the other hand, if it be assumed that the territory acquired but a mere naked trust or power to dispose of the lands and carry out the contemplated public improvements therein described, then the whole act is consistent and harmonious. *Sims v. Lively*, (14 B. Mon. 432.)

These considerations tend so strongly to support the latter theory, that, even admitting the rule of construction assumed by the defendants that the grant must be construed most strongly against the grantor, we would still be constrained to \*hold [ \*380 ] that the second proposition submitted by them cannot be sustained. Legislative grants undoubtedly must be interpreted, if practicable, so as to affect the intention of the grantor; but if the words are ambiguous, the true rule of construction is the reverse of that assumed by the defendants, as is well settled by repeated decisions of this court. *Charles River Bridge v. Warren Bridge*, (11 Pet. 544.)

Most of the cases bearing upon the point previously decided were very carefully reviewed on that occasion, and, consequently, it is not necessary to refer to them. Judge Story dissented from the views of the majority of the judges, but the opinion of the court has since that time been constantly followed. Later decisions of this court regard the rule as settled, that public grants are to be construed strictly, and that nothing passes by implication. That rule was applied in the case of *Mills et al. v. St. Clair County*, (8

How. 581;) and the court say the rule is, that if the meaning of the words be doubtful in a grant, designed to be a general benefit to the public, they shall be taken most strongly against the grantee and for the government, and therefore should not be extended by implication in favor of the grantee beyond the natural and obvious meaning of the words employed; and if those do not support the right claimed, it must fall. Any ambiguity in the terms of the contract, say the court in the case of the *Richmond R. R. v. The Louisa R. R. Co.*, (13 How. 81,) must operate against the corporation, and in favor of the public, and the corporation can claim nothing but what is given by the act. *Perrine v. Chesapeake Canal Co.*, (9 How. 192.) Taken together, these several cases may be regarded as establishing the general doctrine, that, whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation, and in favor of the public, and that nothing passes but what is granted in clear and explicit terms. *Ohio Life and Trust Co. v. Debolt*, (16 How. 435;) *Com. v. The Erie and N. E. Railroad Co.*, (27 Penn. 339;) *Stourbridge v. Wheeley*, (2 Barn. & Ad. 792;) *Parker v. Great W. Railway Co.* (7 M. & Gr. 253.)

[ \*381 ] \*That rule is plainly applicable to this case; and when applied, we think it is clear that the territory acquired nothing under the act of congress set up in the answer but a mere naked trust or power to dispose of the lands in the manner therein specified, and to apply the same to the use and purpose therein specified. Suppose it to be so, then it is not controverted that congress could at any time repeal the act creating the trust, if not executed, and withdraw the power. It is suggested, however, that the closing paragraph of the fourth section of the act is inconsistent with this view of the case, but we think not. Until the trust or power conferred was revoked by a repeal of the act, the lands were to be held by the territory for the use and purpose therein described, and, of course, were to be withdrawn from sale and entry under the pre-emption laws of the United States; and unless some period was fixed for the completion of the contemplated improvement, the delay might become the subject of complaint and embarrassment. Ten years were accordingly allowed for that purpose, and if the work was not completed within that time, then the power of the territory to dispose of the lands was to cease, without any further action on the part of congress. Such part of the lands as had been appropriated at the expiration of that period in execution of the work, were to be unaffected by that provision, but the residue would



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cease to be held by the territory for the use and purpose for which the lands had been granted, and would again fall within the operation of the pre-emption laws. Another suggestion is, that if the views of the plaintiff be adopted by the court, the same rule will apply to all the grants made by congress to the States and other territories. Of course the suggestion is correct, if such other grants are made in the same terms, and are subject to the same limitations, restrictions, and prohibitions; but we have looked into that subject, and think it proper to say, that we see no foundation whatever for the suggestion. One of those grants came under the revision of the court in the case of *Lessieur et al. v. Price*, (12 How. 76,) and this court held, and we have no doubt correctly, that it was a present grant, and that the legislature was vested with full power \*to select and locate the land; but the case is so unlike [ \*382 ] the present that we do not think it necessary to waste words in pointing out the distinction. Our conclusion upon the whole case is, that the act of congress set up in the replication of the plaintiff is a valid law, and that the plaintiff is entitled to prevail in the suit.

Mr. Justice NELSON. I cannot agree to the judgment of the court in this case. The fundamental error of the opinion, I think, consists in not distinguishing between public and private legislative grants. The former concern government—are grants of political power, or of rights of property, connected with the exercise of political power for public purposes, in which no individual or corporate body can set up a vested interest, any more than a public functionary can set up a vested or private interest in his office. These are grants that may be altered, modified, or repealed, at the will of the legislature. Examples of this description of grants are the erection of towns and the incorporation of cities and villages, to which are delegated a portion of the political power of the government, to be administered within their limits and jurisdiction. Private legislative grants are subject to very different considerations. These are grants of rights of property, lands, or franchises, which may be made to individuals or corporate bodies, to towns, counties, States, or territories, and in which the grantee may have private beneficial interests. Examples are, the grant of lands to a town for the founding of a school, or of a church, or for the benefit of the poor of the town. The grantee in all such cases takes a beneficial interest in the grant, as the representative of the persons for whose benefit it is made. The town has an interest in the encouragement and support of schools, in the education of the people under its

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charge, in the support and maintenance of religion and religious institutions, and in the maintenance of the poor. It is well settled in this court that grants of this description, when made by the legislature of a State, cannot be recalled; and we do not perceive any reason why the inviolability of the same class of grants, [ \* 383 ] should be less when made by the legislative power of \* the general government. Congress has made many grants of lands to States and territories for the same or kindred objects; for the founding of seminaries of learning; for building common roads, railroads, and canals; for reclaiming marsh lands, clearing obstructions from rivers, and other like objects. Now, can it be said that the States and territories have no beneficial interest in these grants, or that they hold them as the mere agents of the general government, or as naked trustees, and that they may be recalled at pleasure? I think not; certainly this is not the language of the court in respect to similar grants made by the States to public corporate bodies such as town and cities. If this be the sound construction of this class of grants, and the one to be hereafter adopted and applied, I do not see that any effect is to be given to them until the lands granted have been sold and conveyed to purchasers. They might take a valid title under the power of sale contained in the grant. But even then, the State or territory would derive no benefit from the grant after the sale; for, if they hold the lands as public agents or naked trustees for the general government, as has been argued, the purchase money would belong to it and might be reclaimed. Certainly, if the States and territories are the mere agents of the general government in the grants mentioned, the money would belong to the principal. Indeed, upon the doctrine contended for, I do not see how the sixteenth section in every township of the public lands which is reserved to it for common schools can be held by an indefeasable title. The use for which the grant is made in that instance is as much a public one as a grant of land to the town to build a canal, a turnpike, or railroad. And if a public use of this description deprives the town of any beneficial interest in the grant, then congress may reclaim this sixteenth section if unsold, and, if sold, the purchase money.

It has been strongly insisted, that the grant in question rests upon different principles from one in which the title to the lands has vested directly in the state or territory upon the passage of the law. The 3d section provides that the lands hereby granted, &c., shall be subject to the disposal of the legislature of the territory [ \* 384 ] for the purpose mentioned. The \* 4th section: The lands hereby granted, &c., shall be disposed of by the territory

in the following manner: No title shall vest in said territory, nor shall any patent issue for any part of the land, until a continuous length of twenty miles of said road shall be completed; and when the secretary of the interior shall be satisfied that any twenty miles has been made, a patent shall issue for a quantity of land not exceeding one hundred and twenty sections, and so on, until the road is finished. And then ten years is given for the completion of the road.

This is a conditional grant, the condition particularly specified in this fourth section. The condition is, the construction of twenty miles of the road, when one hundred and twenty sections are to be conveyed, and so on. The idea seems to be, that a conditional grant of this description may be revoked, but not one absolute in its terms. I am not aware of any such distinction. Certainly none is to be found in the common law. At common law or in equity a conditional grant is just as obligatory and indefeasible between the parties as one that is absolute. The grant carries with it not only the right, but the obligation, of the grantee to fulfill the condition; and until the failure to fulfill, the obligation is complete and the grant irrevocable.

It would be singular if the grantor, by availing himself of his own wrong in not waiting for the performance of the condition, could defeat the grant. Certainly it cannot be maintained, that the grant of land on condition is no grant until the condition is performed. And, if so, then why not as effectual and binding as an absolute grant, until default in the condition?

But there is another equally satisfactory answer to this ground for revoking the grant. The provision relied on, instead of furnishing evidence of an intent not to make a binding grant to the territory, leads to a contrary conclusion. Its object cannot be mistaken. It was to secure the application of the lands or the proceeds of them to the construction of the road. The act had before declared that the lands granted should be disposed of by the territory only as the work progressed, and in \*furtherance [ \*385 ] of this purpose, and to prevent any failure of it, provided that no title should vest or patent issue except from time to time as twenty miles of the road were completed. The argument that this provision indicates an intention on the part of congress not to vest any beneficial interest in the territory in the lands seems to me to be founded on a misapprehension of its purport and effect, which was simply to secure the accomplishment of the purposes of the grant.

Then, as to the difference between this grant and the numerous

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others of a similar description, which it is said are subject to a different interpretation. I have examined several of them. The present one is a copy of the others *mutatis mutandis*, with one exception, and that is, instead of withholding the title to the lands till the twenty miles of the road are completed, the act forbids the sale of them till the condition is fulfilled. In the one instance, on satisfying the secretary of the interior that the twenty miles have been constructed, the patent issues for the several sections specified; in the other, on satisfying him that the work has been done, he gives to the State or territory an authority to sell. The different provisions prescribe a different mode of securing the application of the lands to the purposes of the grant. This is the object and only object of each of them; and so far as this distinction goes, other grants of this description will be entitled to the benefit of it in case of an attempt to revoke them.

Mr. Justice WAYNE concurred in the dissent expressed by Mr. Justice *Nelson*, and added, as a further reason against the judgment of the court, that after this grant was made, more than a million of dollars was subscribed upon the faith of it to the railroad corporation.

Mr. Chief Justice TANEY, Mr. Justice GRIER, and Mr. Justice SWAYNE concurred in the opinion of Mr. Justice *Clifford*.

Mr. Justice CATRON did not sit in the case, being prevented by illness.

[ \* 386 ] \* Judgment of the district court reversed, and the cause remanded, with directions to overrule the demurrer filed by the defendants, issue a writ of inquiry to ascertain the plaintiff's damages, and after the return of the inquisition to enter judgment in his favor.

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ALEXANDER G. WOODS, Plaintiff, v. LAWRENCE COUNTY.

1 Black, 386.

MUNICIPAL BONDS IN AID OF RAILROADS.

1. The court affirms the proposition laid down in *Curtis v. The County of Butler*, 24 How. 217, namely: That the act of the Pennsylvania legislature authorizing counties to take stock in the Northwestern Railroad Company, passed February 9, 1853, is valid, and that such stock may be paid for by the bonds of the county, and that a majority of the commissioners may sign and issue said bonds.

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2. The legislature, by omitting the names of the counties in the act, did not intend thereby that they had not power to authorize subscription by counties through which the road did not run, nor is the building of the road through the county a condition precedent to issuing the bonds.
3. The provision of the statute that the railroad company shall not sell the bonds of counties received for subscription at less than par does not render the bonds void, but had relation only to their dealing with the county that it should not sustain the loss.

THE case comes here by a certificate of division of opinion upon points set forth in the opinion.

*Mr. Smith and Mr. Hamilton*, for plaintiff.

*Mr. Taylor and Mr. McComb*, for defendant.

\* Mr. Justice WAYNE delivered the opinion of the court. [ \* 404 ]

This is an action of debt brought upon coupons for interest attached to bonds, which had been passed by the county of Lawrence to the Northwestern Railroad Company, in payment of its subscription for two hundred thousand dollars to the capital stock of that company.

It is here upon a certificate of a division of opinion between the judges of the circuit court.

The company was incorporated as the Northwestern Railroad Company on the 9th February, 1853, with the power to build a railroad from some point upon the Pennsylvania or the Alleghany Portage railroad, at or west of Johnstown, by the way of Butler, to the Pennsylvania and Ohio State line, at some point on the western boundary line of *Lawrence county*. It was to be done on the most eligible route, &c., &c., and to be connected with any railroad then constructed, or which might thereafter be built, at either end or at any intermediate point on the line thereof. The capital stock was to be twenty thousand shares, of fifty dollars each, with power to increase it to two millions of dollars, if the directors of the company should think its exigencies required that to be done. The company was authorized, in either event, in respect to the amount of \*capital, to build the road *by borrowing money* [ \* 405 ] *on its bonds, bearing interest at seven per centum*, not exceeding the amount of its capital, and with the further limitation, that no bond should be issued for less than one hundred dollars. The seventh and last section of the act is, that the counties, through parts of which the railroad may pass, are severally authorized to subscribe to the capital stock of the company, and to pay its subscription in such manner as might be agreed upon between the county and the company. But no county could subscribe more than

## Woods v. Lawrence County.

ten per cent. upon its assessed valuation; and before any subscription could be made, its amount was to be determined by a grand jury of the county, and approved by it. And when that had been done and filed, the county commissioners were authorized to make the subscription as the grand jury had directed. Then follows a proviso, that when the bonds of the county were passed to the railroad company, they should not be sold by it at less than their par value. The meaning of that proviso will be given hereafter, when we shall consider the fourth question upon which the judges were divided in opinion.

Upon the trial of the case, the plaintiff gave in evidence the recommendation and direction of the grand jury for the subscription. It was executed by the commissioners to the amount of two hundred thousand dollars, for the payment of which the county was to issue bonds, with such conditions as might best promote the interests of the railroad company and of the county of Lawrence. The plaintiff also gave in evidence one of the coupons upon which he had sued, attached to the county bonds. We give a copy of it, that the obligation of the county to pay those coupons and their bonds, when the latter shall become payable, may be better understood:

## COUNTY OF LAWRENCE.

Warrant No. 37 for 30 dollars. Being for six months' interest on bond No. —, payable on the first day of January, A. D. 1873, at the office of the Pennsylvania Railroad Company in Philadelphia.

\$30.

—————, Clerk.

Here the plaintiff rested his case.

The defendant gave in evidence the agreement for the [\* 406] \*subscription, as made by the commissioners. We have examined it in connection with the presentment of the grand jury, and found both properly in conformity with the section of the act giving to the counties, severally, the right to subscribe. It is recommended and determined, that the subscription of the county of Lawrence shall be two hundred thousand dollars, or four thousand shares of the capital stock of the railroad company, it being understood, that, whenever the amount of it should be required by the company from the county, it should be paid in bonds of sums not less than a thousand dollars, payable in twenty years after date, or at such other times after the date of the bonds as might be agreed upon between the commissioners of the county and the railroad company, the interest upon the bonds to be paid semi-annually by the *railroad company*, until the time when the road shall have been completed.

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The defendant then gave other evidence, to prove that when the grand jury made its presentment, the railroad company had not been organized; also, that when the subscription was made, the company had not fixed upon its line, or that any part of it should be run within the limits of Lawrence county, and then that no part of it had ever been built within that county.

It was also proved by the defendant, that the company, in using the bonds of the county to get money upon them for the construction of the road, had sold them at a discount of twenty-five per cent., but not with having credited the county with less than their par amount.

Thus the case stood when it was submitted to the jury, and the defendant asked the court to give the following instructions:

1. That there was no authority vested in the county of Lawrence to make the subscription to the Northwestern Railroad Company, and that the subscription and the bonds which had been issued for its payment were void.

2. That the recommendation and report of the grand jury were materially deficient, in not setting forth or prescribing the terms and manner of payment, and that the subscription was void on that account.

\* 3. That the county of Lawrence was not authorized to [\* 407] issue the instruments or bonds in question.

4. That the county bonds, which had been given in payment of the subscription, having been sold below their par value, was contrary to the provision of the act incorporating the railroad company, and were, therefore, avoided in the hands of purchasers.

We observe, in respect to the first, second, and third questions, that they are not now open questions in this court. They were in effect comprehended in the case of *Curtis v. The County of Butler*, which this court passed upon at the last term, as well in respect to the constitutionality of the act of the 9th of February, 1853, as to what was the proper construction of it. This court then decided, after mature deliberation upon all the sections of the act, assisted by the arguments of Mr. Stanton and Mr. Black, which were in every particular fully up to the occasion, that, by the 7th section of the act of the 9th February, 1853, the counties through parts of which the Northwestern railroad may pass were authorized to subscribe to the capital stock of the company, and to make payments on such terms as might be agreed upon between the company and the county; and that the subscription was valid, and binding upon it, when made by a majority of its commissioners. It was also then decided, that the power given to the county to subscribe included

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its right to issue bonds, with coupons for interest attached, for the payment of its subscription. The constitutionality of the act was admitted in the argument then, as it has been in this case. But it is now urged, in addition to what was then said, that as the county of Lawrence had not been empowered *by name* to subscribe, such omissions must suggest a purpose of the legislature, when passing the act, to accommodate itself to what is asserted to have been, at that time, the constitutional law of Pennsylvania, as it had been expounded by the supreme court of that State, in respect to the right of the legislature to empower a county to subscribe and tax the people of it to pay for railroads and other improvements of a like kind, which were not positively to be constructed within its territory.

[ \* 408 ] \* One of the cases cited is that of the Commonwealth, *ex relatione* Dysart v. McWilliams and Isett. It was a *quo warranto*, in which it was alleged that they had usurped the office of supervisors and assessors of Franklin township, under and by virtue of the act of the 13th April, 1846, and of assessing, levying, and collecting taxes, for the use and benefit of the Spruce Creek and Water Street Turnpike Company. And it was decided that the defendants, as supervisors, had the power to levy and collect a tax to enable them to subscribe for shares of the stock of the turnpike company, at the cost of the inhabitants of the township, in virtue of the authority vested in the supervisors of townships by the act of the 15th of April, 1834, and because the 16th section of the act of 1846, incorporating the turnpike company, had provided that the supervisors of the public highways, in the townships through which the road may pass, "were authorized to subscribe in the name and behalf and for the use of its inhabitants any number of shares, not exceeding three thousand six hundred, in the capital stock of the turnpike road." The decision is not put upon the locality of the route of the road, though, in fact, it was located and passed through the township of Franklin; but upon the constitutional power of the legislature to pass both acts just mentioned, and that, in doing so, it did not differ in principle from the power given to tax for the purpose of repairing roads and bridges, and for such other purposes as may be authorized by law.

Before leaving this case, we recommend it as a whole, and particularly the decision of Mr. Justice Bell, to the perusal of such of the profession who may be engaged in a case of *quo warranto* in the State of Pennsylvania.

The other case cited of *McDermond v. Kennedy*, (Brightley's Reports, 332,) which was taken to the supreme court and affirmed.



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is, that a municipal corporation, under a power to make such by-laws as shall be necessary to "promote the peace, good order, benefit, and advantage of the borough," and to assess such taxes as may be necessary for carrying the same into effect, *is not authorized to levy a tax* for the payment of a part of the expense to be incurred by a railroad company in \* bringing the line [\* 409] of their road nearer to the town than it had been originally located. Judge Reed places his conclusion, exclusively, upon the disability of a borough corporation to exercise rights on private property, except for corporate purposes; and he says, it can no more raise a tax, and grant the avails of it to a railroad, because it is believed to be advantageous to the borough, than they could do anything else, for there is no relation or connection between the railroad and the borough. Neither of the cases cited have any application to sustain the position taken—that the legislature meant, by omitting the names of the counties in the act of the 9th February, 1853, that it had not the power to authorize them to subscribe to the capital stock of a railroad which was not to be run within its territory.

Nor do these cases countenance the idea, that the power given to the county to subscribe was not exercisable *in presenti*, but was in abeyance until the passing of the railroad through it. It is true, when a charter is given for franchises or property to a corporation, which is to be brought into existence by some future acts of the corporators, that such franchises or property are in abeyance until such acts shall have been done, and then they instantaneously attach. But not to distinguish the acts enjoined or permitted to give to the corporation its intended purpose and object, is to confound the franchises with such acts, and would nullify the means by which the franchises are to be produced.

A franchise is a privilege conferred in the United States by the immediate or antecedent legislation of an act of incorporation, with conditions expressed, or necessarily inferential from its language, as to the manner of its exercise and for its enjoyment. To ascertain how it is to be brought into existence, the whole charter must be consulted and compared. If that depends upon co-operating subscriptions of money, to be borrowed upon securities of indebtedness bearing interest, payable yearly, or at times within the year, until the security is finally payable, it must be intended that all the parties, to whom has been given a right to subscribe, may use it to aid the beginning and the completion of the object; in other \* words, when there is no express limitation [\* 410] as to the time of making the subscription, that it was

optional with those who could do so to make it, when most convenient or advantageous to themselves. In this instance, we find that certain persons were named in the first section of the act as commissioners to receive subscriptions and to organize the company; and that the counties, through parts of which the railroad may pass, were permitted to make their subscriptions with those commissioners, and that they could receive them. Then, it was intended that the subscription should precede the organization; and no one, who reads the whole act, will doubt that the latter depended upon the subscription of the larger, if not the whole number of the twenty thousand shares, of which the capital stock was to consist.

The road was to be built with money to be borrowed on the bonds of the company, and upon the bonds of such of the counties meant in the act which might choose to subscribe. Until the subscription received had indicated the responsibility of the parties to be equivalent to the contemplated cost of the road, or that it would become so, there was neither an inducement to organize the company, nor security for capitalists to lend upon.

We conclude that there is no weight in the suggestion, of its having been meant by the legislature that the road was to be carried within a county before it could subscribe. The subscription depended upon the presentment of the grand jury, and the agreement of the commissioners to take for the county four thousand shares of the company's capital stock. And it was agreed that the subscription was to be paid for in bonds of the county of not less than a thousand dollars, payable in twenty years after date, or at such other time as the company and the county might agree upon. The company having agreed to pay the interest until such time as the Northwestern railroad should be completed, the county bonds were made and paid to the company accordingly; and we have no doubt of the obligation of the county to pay them.

But it is now said, that such of the county bonds as were sold by the president and directors of the railroad at a discount [ \* 411 ] \*are "avoidable" in the hands of the purchasers of them, because the act for making and paying them to the company declares that the company shall not sell them "at less than their par value." Such are the words of the statute; and it was proved and conceded by the plaintiff that they were sold at a discount of twenty-five per cent.

The words of the seventh section are, that whenever bonds of the respective counties are given in payment of subscriptions, the same shall not be sold by said railroad company at less than par value.

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Those words have a meaning, but not such as it was assumed to be when the court was asked to instruct the jury upon the fourth prayer. A comparison of the seventh section, in which they are, with the fifth and sixth sections of the act, will show that they were meant to secure to the counties the par value of their installments, as those were to be paid in bonds, from any reduction by the sale of them at a discount, to the loss of the county, after the railroad company had received them in payment. The words are, whenever bonds of the respective counties are given in payment, the same shall not be sold by the railroad company at less than par value, &c.; and such bonds shall not be subject to taxation until the clear profits of the railroad shall amount to six per cent. upon the cost of it. Such was the understanding of the commissioners and the railroad company when they entered into their agreement for the subscription. The agreement itself, the stipulation that the subscription was to be paid by bonds, the undertaking of the company that it would relieve the county from the payment of interest of its bonds, and that the interest should be on their par value until the entire railroad was completed—and every section of the act shows it to have been the intention of the legislature to have the railroad constructed by money to be borrowed upon bonds, payable at a distant date—indicate the correctness of our interpretation of the limitation upon the sale of the county bonds at less than par. And the conclusion is strengthened by consulting the sixth section of the act, giving to the company the right to pay an interest of six \*per cent per annum to the stock- [ \* 412 ] holders, on installments for subscription paid by them until the railroad should be finished; and requiring, when that happened, that all interest which had been paid in the meantime should be credited to the cost of the construction of the road—in that, placing all of the stockholders upon an equality as to the cost of the road, and securing to them the number of shares for which they had subscribed, and for which they had paid by installments. Without such an arrangement, that equality could not have been produced, and this result in respect to the subscription of the counties paid by bonds would have followed. If the railroad could have sold the bonds at less than par, after they had been received in payment, and charged the discount to the counties, in that case the latter could not have received the number of shares for which they had subscribed, by permitting a part of the sum, for which they were authorized to tax the counties, for the ultimate payment of the bonds, to be diverted to a purpose neither contemplated nor allowed by the act; and, in respect to the county of Lawrence, its

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subscription would have been reduced to fifty thousand dollars less than the amount of the bonds which it had issued and paid to the railroad, supposing the whole to have been sold at 25 per cent. less than their par value, in that way reducing its dividend—three thousand dollars per annum—when the clear income of the company, after it had been finished, should become six per cent. per annum upon the cost of the road.

We are confirmed in the opinion, that the limitation upon the company that it should not sell the bonds of the counties at less than par, after it had taken them in payment of the subscription, had no other meaning than this, that they should not so sell them at the expense of the counties—causing any loss to them less than their par value, as they were payable to the company at par in twenty years, with an annual interest of six per cent.

It has also been insisted, that the county of Lawrence could not subscribe before the Northwestern Railroad Company had been organized, or before its line had been indicated by a survey on the ground and a part of it had been fixed for construction within the county; and it is said that no part of it had been built in it.

Having already shown that the right to subscribe was given to enable the company to organize, and that organization was essential before the route of the road could be determined, and that there was no direction in the act when that was to be done, and that a wide discretion had been given as to the point of its beginning, and how it should be continued in the counties, and where it should terminate on the Pennsylvania and Ohio State line, we must declare that the objection has neither pertinency nor force against the subscription made by the county of Lawrence. Another objection is, that the right to subscribe depended upon a part of the road having been built within the county.

We deem it only necessary to repeat what has just been said, that the act indicates no point at which the line of the road should be begun. That, taken in connection with the fourth section of the act, it could not have been the intention to require a part of the railroad to be built in each county before it should subscribe; its language being, that its franchises should be used and enjoyed when five miles of the railroad had been finished, as fully as if the whole road had been completed.

We therefore answer, that there was authority in the county of Lawrence constitutionally, and by the proper construction of the act of the 9th February, 1853, to subscribe to the stock of the Northwestern Railroad Company as the subscription was made; and

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Baxter v. Camp.

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that the bonds issued by the county, and given in payment of its subscription to the railroad company, are valid, and binding upon the county to pay and redeem them according to their tenor.

We answer to the second prayer, that there was no deficiency in the action of the grand jury in making its presentment, or in setting forth the terms in which the subscription should be made.

We answer to the third prayer, that the county of Lawrence was authorized to issue such bonds as they did issue, and pass  
\*to the railroad company in payment of its subscription [ \* 414 ]  
to the Northwestern Railroad Company.

To the fourth prayer, we answer, that the sale of the county bonds, by the railroad company, at less than par, does not avoid them in the hands of the purchaser.

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THE SHIP MARCELLUS.

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JOHN BAXTER and others, Appellants, v. CAMP and others.

1 Black, 414.

ADMIRALTY—COLLISION.

1. In this case we are of opinion, that the weight of testimony is in favor of the charges of the libel and of the decree rendered by both the district and circuit courts.
2. We reassert the proposition, that when the controversy turns on the weight of evidence, and the district and circuit courts both have found the same way, the presumption is against the appellant.

APPEAL from the circuit court for the district of Massachusetts.  
The matter is stated in the opinion.

*Mr. Russell*, for appellants.

*Mr. B. R. Curtis*, for appellees.

\*Mr. Justice GRIER delivered the opinion of the court. [ \* 416 ]  
The collision, which is the subject of inquiry in this suit, took place in the narrows, in Boston harbor, between Lovell's island and Gallop island.

The libelants are owners of the schooner *Empire*, and the appellants of the ship *Marcellus*. The schooner was going out, the ship coming into Boston harbor. They were sailing in opposite courses, through a channel of about three hundred and sixty feet.

The libelants charge in their libel, that the collision was wholly attributable to the carelessness and negligence of those in the ship. They allege that the wind, just before and at the time of the col-

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The Ship *Marcellus*.

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lision, was south-southwest; that the schooner was sailing on the western side of the channel, close-hauled on the wind, with her starboard tacks aboard, and with all or nearly all her sails set; that she was steering southeast by south, working up to the wind, in order to give the ship as much room as possible; that the ship was sailing up the channel at great speed and with the wind free, so that she might have passed the schooner on the larboard side without difficulty; that as the ship approached towards the point of danger, the schooner hailed her to keep off; that the hail was answered from the ship, requiring the schooner to luff, which was impossible, as she was already close to the wind; that the schooner did not change her course, but that the ship, immediately after she hailed the schooner, luffed, and instantly ran into the schooner, and presently both vessels drifted to the leeward shore.

[ \* 417 ] \* In their answer, the respondents admit that the collision occurred at the time specified in the libel, and that the ship was running free on her larboard tack, but allege that the collision took place on the easterly side of the channel, and that every possible precaution was taken by the ship, by hailing and otherwise, to prevent the vessels from coming in contact. Their theory is, that it was occasioned entirely through the fault and mismanagement of those in charge of the schooner, and accordingly allege that the wind at the time of the collision was southwest; that the ship between six and seven o'clock was sailing along the leeward edge of the channel, hugging the shore as close as it was possible for her to do with safety; that while so passing, the schooner was discovered some distance ahead coming down the harbor with a free wind, and appearing at first to be going to the windward of the ship, as she should and might easily have done, but that she afterwards changed her course as if going to the leeward, and when she had approached within a short distance of the ship, luffed across her bows, resulting in a violent collision, sinking the schooner and damaging the hull, rigging, and spars of the ship, for which they pray they may be allowed.

The only question proposed by these pleadings is one of fact. In this, as in all other cases of the kind, there is great discrepancy and conflict in the testimony of the witnesses, as to every averment in the pleadings. We have had occasion to remark more than once, that, when both courts below have concurred in the decision of questions of fact under such circumstances, parties ought not to expect this court to reverse such a decree, merely by raising a doubt founded on the number or credibility of witnesses. The appellant in such case has all presumptions against him, and the

burthen of proof cast on him to prove affirmatively some mistake made by the judge below, in the law or in the evidence. It will not do to show that on one theory, supported by some witnesses, a different decree might have been rendered, provided there be sufficient evidence to be found on the record to establish the one that was rendered.

When the wind is southwest, it is the general rule that \* vessels going out shall keep to the windward side of the [ \* 418 ] channel, and the vessels coming in the leeward. The witnesses, who could know best, testify, that throughout the passage down the narrows the schooner was kept close to the wind, and was not suffered to fall off, and did not luff at all. Others may have formed erroneous judgments. But if their testimony be untrue, they must have willfully perverted the truth. It is a common mistake to attribute the motion of one of two passing bodies to the other. Calculations of time and distance, resting on the loose recollections of witnesses, can seldom be relied upon with much confidence. The collision took place in the evening, when it was not quite dark. The testimony of three of the ship's crew concurs with that of witnesses on the schooner, in establishing the state of facts as alleged in the libel.

The pilot of the ship had observed the approach of the schooner, and directed the mate to go forward and see how she was standing. He did so ; and observing that the schooner was heading to windward of the ship, he responded to the order : " all right, she is going to windward ;" but in a short time was heard to say : " luff, hard-down, hard-down, luff," which were the first words heard by the man at the wheel ; the pilot repeated the words, " hard-down, luff." The wheel was let down, or nearly so, when the order was changed to " hard up ;" but before this last order could have any effect, the collision took place.

Another of the ship's crew gives a similar account, with some difference : that the mate of the ship called out to the schooner " to luff ;" and repeating the command to them, " you must luff, heave her hard-down." During this colloquy, the ship luffed, as the witness supposed, in consequence of the pilot having made the mistake, of supposing the mate's order " to luff " was directed to him.

The collision was attributed by some on the ship to the fact, that the mate "*bothered*" the pilot. This testimony, on the part of the crew of the ship, corroborates that of the officers and crew of the schooner. Without any further attempt to vindicate the correctness of the decree, by a minute comparison of the testimony, it is suffi-

Cleveland v. Chamberlain.

[ \* 419 ] cient to say, that the weight of \*the testimony is on the side of the charges in the libel, and supports the decree of the court below, which is therefore affirmed.

1b 419 NEWCOMBE CLEVELAND and others, Appellants, v. SELAH CHAMBER-  
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1 Black, 419.

FRAUD UPON THE COURT—ONE PARTY CONTROLLING BOTH SIDES OF THE LITIGATION.

Where the appellant has purchased by a friend, the debt against which he appeals, and carries on a pretended controversy by counsel paid by himself on both sides, on a record selected by them for the purpose of obtaining a decision injurious to the rights of persons not before the court, the appeal will be dismissed on affidavits proving these facts.

THIS is an appeal from the district court for the district of Wisconsin.

*Mr. Black*, on behalf of Milwaukie and Minnesota Railroad Company, its stockholders and creditors, not parties to the record, moved, on affidavits filed, to dismiss the appeal, on the ground that Chamberlain, the appellant, was conducting the appeal on both sides, having purchased out the opposing party.

*Mr. Reverdy Johnson* opposed the motion.

[ \* 425 ] \* *Mr. Justice GRIER* delivered the opinion of the court.

This appeal must be dismissed. Selah Chamberlain is, in fact, both appellant and appellee. By the intervention of a friend he has purchased the debt demanded by Cleveland in his bill, and now carries on a pretended controversy by counsel, chosen and paid by himself, and on a record selected by them, for the evident purpose of obtaining a decision injurious to the rights and interests of third parties.

There is no material difference between this case and that of *Lord v. Veazie*, (8 How. 254,) when the whole proceeding was justly rebuked by the court as "in contempt of the court, and highly reprehensible." That case originated in a collusion between the parties. In this case the appellee, who was a judgment creditor of the La Crosse and Milwaukee railroad, filed his bill to set aside a fraudulent conveyance of the debtors' property made to the appellant, and other fraudulent conveyances of their lands made to certain directors of the company, who were also made parties respond-



ent. The case was prosecuted with vigor by the complainant till a decree was obtained, (on the 11th of February, 1859,) setting aside the various assignments, and the case "committed to a master to ascertain and report the annual income of the several lots described in the bill," &c. This was not a final decree. Nevertheless, an appeal was permitted to be entered by Chamberlain on the 12th of February, 1859. But the record was not brought up to this court for a year and a half, nor so long as there were parties litigant who had adverse interests. About a month after the decree was entered, Chamberlain became the equitable owner of Cleveland's judgment, and the "*dominus litis*" on both sides.

\* He then agreed to pay counsel who appeared for Cleve- [ \* 426 ] land, the appellee, but, for anything that appears, without the knowledge of the counsel, who, in July, 1860, entered a discontinuance as to the parties, against whom a decree had not been entered.

It is plain that this is no adversary proceeding, no controversy between the appellant and the nominal appellee. It differs from the case just cited in this alone, that *there* both parties colluded to get up an agreed case for the opinion of this court; *here*, Chamberlain becomes the sole party in interest on both sides, makes up a record, and has a case made to suit himself, in order that he may obtain an opinion of this court, affecting the rights and interest of persons not parties to the pretended controversy.

We repeat, therefore, what was said by the court in that case: "Any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law, which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court."

It is but proper to say, that the counsel who have been employed in the case are entirely acquitted of any participation in the purposes of the party.

This case came on to be argued on the transcript of the record from the circuit court of the United States for the district of Wisconsin; and it appearing to the court here, from affidavits and other evidence filed in this case in behalf of persons not parties to this suit, that this appeal is not conducted by parties having adverse interests, but for the purpose of obtaining a decision of this court, to affect the interests of persons not parties—it is therefore now here ordered and adjudged by this court, that the appeal in this case be and the same is hereby dismissed, with costs.

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Vance v. Campbell.

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## VANCE, Plaintiff in Error, v. CAMPBELL and others.

1 Black, 427.

## PATENT LAW.

1. The patent, for an infringement of which this suit is brought, is for a combination, and the declaration is for an infringement of the patent as described in that instrument. Plaintiff cannot in such case, when it is shown that defendant did not use part of the combination, rely upon the fact that such part is of no value in the combination.
2. Having both in his patent and in his declaration set out his combination as an entirety, he is bound by it, and cannot charge as an infringement anything less than the use of the whole. The 9th section of the act of 1837, 5 U. S. Stats. 194, has reference to a claim of more than the patentee invented, in a case where the part invented can be clearly distinguished from that which he has not.
3. The federal courts follow the State courts as to rules of evidence, including competency of witnesses, when there is no act of congress to the contrary, and in Ohio, where plaintiff was offered and was by the law of that State competent as a witness, his rejection is error, for which the judgment must be reversed.
4. Where the testimony which this witness would have given is not disclosed, this court cannot presume it was immaterial to save the judgment.

WRIT of error to the circuit court for the southern district of Ohio. The case is stated in the opinion.

*Mr. Lee* and *Mr. Fisher*, for plaintiff.

*Mr. Lincoln*, for defendants.

[ \* 428 ] \* Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the circuit court of the United States for the southern district of Ohio.

The suit was brought by Vance against the defendants in the court below, for the infringement of a patent for certain improvements in cooking stoves.

The patentee recites in his specification, that it has been very difficult heretofore to make the bottom and back plates of the oven sufficiently hot, and equally difficult to prevent the front and top from becoming too much heated. For this difficulty, he says, he has devised a remedy, which consists in a particular arrangement of the flues, for the purpose of equalizing the draught above and below the oven.

To heat the oven equally on all sides, he further observes, it must be uniformly enveloped with heated products of combustion; and, to this end, the flue is divided in front of the oven into two branches, one passing above, the other below the oven, and which reunite near the middle of the back flue, where they enter the pipe i, or

smoke-pipe, which is made to descend to that point. The patentee then speaks of certain irregularities that would still exist in the distribution of the heat around the oven, to prevent which he places a plate A in front of the cold-air chamber, so as to form a flue in front, whose mouth is at the same distance from the flue above the oven that the lower end of the pipe *i* in the back part of the stove is below the oven; and these flues being at all times unobstructed, their action will be uniform, and the heat be equally distributed under all circumstances on the several sides of the oven. The patentee then states, that he claims as new, and for which he desires a patent, "the combination of the diving pipe *i* with the flues F, arranged as herein described, for the purpose of evenly distributing and equalizing the heat on four sides of the oven, without using or requiring any dampers, as herein set forth."

The main point in the case turned upon the question of infringement. The defendants' stove had no plate A in front of the cold-air chamber, forming a front flue; and, hence, one of \*the elements of the plaintiff's combination was not used; [ \* 429 ] and, if so, there would be no infringement. The plaintiff, however, sought to get rid of the objection, by proving that that part of his contrivance and claim were immaterial and useless, and that the diffusion of the heated air around all sides of the oven would be as effectual without as with it. Assuming this proof to be competent to help out the infringement, the patent would stand on the combination of the diving pipe *i* and flues, as arranged, without the front flue, formed by the plate A in front of the cold-air chamber, and the division of that flue called the "mouth" in the specification.

Now, the plaintiff in his declaration sets out the patent, specification, and claim as issued to him by the government, and founds his action upon them as thus set out, and charges the defendant as having infringed the invention as thus claimed. The infringement as charged is denied. This is the issue presented for trial, and which the defendants were called upon and were bound to prepare to meet. This issue involved the question, whether or not the defendants had infringed the improvements in the cooking stove, consisting of a combination of the diving pipe *i* with the flues, as arranged, one of which was a flue in front of the stove formed by plate A, the flue being one of peculiar construction. It is quite apparent, if this part of the combination is abandoned, and the remaining part of it relied on alone, the issue is changed, and the defendants surprised, the pleadings misleading instead of advising them of the question to be tried.

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It is true, by the ninth section of the act of 1837, (5 U. S. Stat. p. 194,) it is provided, that the suit shall not be defeated where the patentee claims more than he has invented; it must be, however, in a case where the part invented can be clearly distinguishable from that claimed, but not invented.

This provision cannot be applied to the present case, for, unless the combination is maintained, the whole of the invention fails. The combination is an entirety; if one of the elements is given up, the thing claimed disappears.

Besides the above view, it is most apparent, from an examination of the specification, that the patentee not only described, [ \* 430 ] \* but claimed the front flue formed by the plate A, fig. 2, as a material and important part of the arrangement for distributing equally the hot air on the several sides of the oven. To prevent irregularities, referred to and particularly described, he observes: "I place the plate A, as in fig. 2, so that it will form a flue in front of the cold chamber, whose mouth (as it is called) is at the same distance from the flue above the oven that the lower end of the pipe *i* is above the flue below the oven; and these flues being at all times unobstructed, their action is uniform, and the heat is equally distributed, under all circumstances, on the several sides of the oven." The patentee might as well have undertaken to prove any other part of the combination immaterial and useless, as the part above, and its uses so particularly described. Indeed, according to the doctrine contended for, a patent would furnish no distinct evidence of the thing invented, as that would depend upon what part of the specification and claim the jury might think material or essential.

Several exceptions were taken to the admissibility of evidence offered by the defendants, but without referring to them specially, it will be a sufficient answer to say, that it was competent and relative as showing the state of the art in respect to improvements in the manufacture of cooking stoves at the date of the plaintiff's invention. No notice was necessary in order to justify the admission of evidence for this purpose.

The plaintiff, in the course of the trial, was offered as a witness, and objected to by the defendants as incompetent, and his testimony was excluded. It is admitted that the testimony of the parties to the suit is competent, according to the rules of evidence in the State courts of Ohio.

The thirty-fourth section of the judiciary act provides that the laws of the several States, with the exceptions there stated, shall be regarded as rules of decision in trials at common law in the

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courts of the United States. This section has been construed to include the rules of evidence prescribed by the laws of the State in all civil cases at common law not within the exceptions therein mentioned. The point has not been, perhaps, expressly decided in a case reported in this court, but \* the principle has been recognized in several cases. (12 Peters, 89; 6 How. 1; 12 How. 361.)

The facts which this witness offered to prove are not stated in the bill of exceptions. We cannot, therefore, disregard the exception upon the idea that the testimony could not have been material, or could not have changed the result of the verdict.

Judgment reversed—*venire de novo*.

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HAUSKNECHT, Plaintiff in Error, v. CLAYPOOL and LYNN.

1 Black, 431.

EVIDENCE—COMPETENCY OF WITNESS GOVERNED BY STATE LAW.

1. The principle decided in the previous case is the principal one in this, namely, that a plaintiff who by the law of Ohio is a competent witness in his own behalf, is also a competent witness in the federal courts sitting in that State.
2. Though it would have been the better practice to have shown by the bill of exceptions that his testimony would have been material, this will be presumed when it is shown he was rejected for incompetency as a party.

WRIT of error to the circuit court for the southern district of Ohio. The case is stated in the opinion.

*Mr. Lee and Mr. Fisher*, for plaintiff.

*Mr. Lincoln*, for defendant.

\* Mr. Justice NELSON delivered the opinion of the court. [ \* 434 ]

This suit was brought by the plaintiff in error against the defendants for the infringement of a \* patent for an [ \* 435 ] improvement in the running gear of carriages. The verdict and judgment were for the defendants.

The only question presented in the bill of exceptions is, whether or not the plaintiff was a competent witness to give testimony in his own behalf. According to the law of Ohio, parties are competent witnesses. The case falls within the opinion of the court just delivered in the case of *Vance v. Campbell* and others. It is objected that the bill of exceptions does not state that the witness was material, and hence there could be no error in his exclusion.

## The Jefferson Branch Bank v. Skelly.

The bill of exceptions is brief, presenting only this single question, and stating no more of the case than is necessary to present it, which practice the court commends.

The bill states that on the trial the plaintiff, to sustain the issue on his part, offered himself as a witness, and his counsel claimed he was competent, &c. Though it would have been more in conformity with the usual practice to have stated that the witness was material to sustain the issue, we think that enough is stated to imply the materiality, and that this objection cannot be maintained.

Judgment reversed—*venire de novo*.

THE JEFFERSON BRANCH BANK, Plaintiff in Error, v. ALEXANDER SKELLY.

1 Black, 436.

CONSTITUTIONAL LAW—STATUTES IMPAIRING OBLIGATION OF CONTRACTS.

1. The rule of this court has universally been, that the construction given by the courts of the States to State legislation and State constitutions have been conclusive on us *with a single exception*, and that is when it has been called upon to decide whether a legislative act creates a contract.
2. The obligation imposed upon this court by the constitution to determine whether a State statute impairs the obligation of a contract, demands of us that we decide independently of State courts whether there is a contract, though it be in the form of legislative enactments.
3. In every case, therefore, where a subsequent statute is asserted to impair the obligation of a contract found in a former statute, it is a necessity that this court, in reviewing the judgment of a State court on that question, must decide independently of the State court on the existence of a contract in the first statute.
4. This court reaffirms the right of a State legislature, unless prohibited by the language of its constitution, to contract to release the exercise of the taxing power as to a particular thing, corporation, or person.
5. The court also adheres to and comments on the cases in which it has decided that the 60th section of the act of 1845 (the bank charter) is a contract of exemption from all other taxes but those therein mentioned, and that the act of 1852 is a violation of that contract, and therefore void under the provisions of the constitution of the United States against impairing the obligation of contracts.

WRIT of error to the supreme court of Ohio. The case is fully stated in the opinion.

*Mr. Vinton*, for plaintiff in error.

*Mr. Murray*, for defendant.

[ \* 442 ] \* Mr. Justice WAYNE delivered the opinion of the court.  
This case has been brought to this court by a writ of error to the supreme court of the State of Ohio.

Its purpose is to revise a judgment rendered by that court, in which it has, among other things, declared, contrary to the uniform decisions of this court upon the same subject-matter, that the 60th section of the charter of the State Bank of Ohio is not a contract within the meaning of that clause of the constitution of the United States which provides "that no State shall pass any law impairing the obligation of contracts."

We shall not now reargue the question, nor any point in connection with it, thinking it best to give, without addition, what have been the judgments of this court, when the matter in connection with the charter of the State Bank of Ohio has been before it. The reasoning of the supreme court of Ohio has, at all times, had our most respectful consideration. *Hoc non obstante*, however, it is again reproduced by that court as the foundation of its judgment, without other illustration than it had when we first were called upon to review it; and we are now asked to reconsider it by the district attorney, James Murray, Esquire, upon an intimation, that this court might be induced to reverse its decision in the *Piqua Branch* case, because that judgment of this court involves the construction of the constitution and laws of the State of Ohio differently from what both had been decided to be by the supreme court of the State, and that the supreme court of the United States should follow or conform to the conclusion of the former, at the same time admitting that there had been an inconstancy of interpretation by the supreme court of Ohio in its judgments upon the 60th section of the charter of the State Bank of Ohio.

\* We answer to this, as this court has repeatedly said, [\* 443] whenever an occasion has been presented for its expression, that its rule of interpretation has invariably been, that the constructions given by the courts of the States to State legislation and to State constitutions have been conclusive upon this court, *with a single exception*, and that is when it has been called upon to interpret the contracts of States, "though they have been made in the forms of law," or by the instrumentality of a State's authorized functionaries, in conformity with State legislation. It has never been denied, nor is it now, that the supreme court of the United States has an appellate power to revise the judgment of the supreme court of a State, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself

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aggrieved by some particular State legislation, if this court could not decide, independently of all adjudication by the supreme court of a State, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the supreme court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the constitution of the United States, follow the construction of the supreme court of a State in such a matter, when it entertained a different opinion: and in forming its judgment in such a case, it makes no difference in the obligation of this court in reversing the judgment of the supreme court of a State upon such a contract, whether it be one claimed to be such under the form of State legislation, or has been made by a covenant or agreement by the agents of a State, by its authority.

We have thus given, very much in what has been the language of this court, what has been always its attitude in respect [ \* 444 ] \* to the revisal of the judgments of the supreme court of a State upon contracts which have been declared not to be within the protection of the constitution of the United States.

We will now show, that this opinion may be better understood, in connection with the citations which will be produced to sustain it, the origin of this controversy from its proceedings and pleadings.

It was an action of trespass brought by the plaintiff in error against the defendant Skelly, for forcibly entering the plaintiff's banking-house, and taking and carrying away gold coin, the money of the plaintiff. To this charge the defendant pleaded the general issue, not guilty, and two pleas of justification substantially the same. They are: That the defendant, as treasurer of the county, had received from the auditor for the collection of taxes, a tax duplicate of \$5,303 70, which had been assessed in the year 1852 upon the plaintiff's property for State and county taxes, and other purposes; that being unpaid after the time allowed by law for its payment, he had seized and taken from the plaintiff's banking-house \$5,568 88 in money of the plaintiff, to satisfy the tax and penalty for default of payment, as he had the right officially to do. To these pleas the plaintiff replied: That the bank prior to 1850 had been incorporated and organized as a banking company, in conformity with an act of the general assembly entitled "An act to incorporate the State Bank of Ohio and other banking companies," passed the 14th of February, 1845, and as such had carried on business as a branch of the State Bank of



Ohio, and was then doing so; that it had at all times, as required by the 60th section of the act, set off to the State six per centum on its profits, deducting from it the expenses and its ascertained losses for the six months preceding; and that the cashier had punctually, within ten days after having done so, informed the auditor of the State that it had been done, and that it had paid the same, whenever required, to the treasurer, upon the order of the auditor, and that they had been and were then ready to pay the amount according to law.

It is alleged, that the bank had performed all required by the 60th section of the act of incorporation, and that from its \* acceptance of the act and compliances with it, a contract [ \* 445 ] had been made between the State and the bank, according to the 60th section, that the six per centum on the profits of the bank, to be divided semi-annually and set off to the State of Ohio, should be in lieu of all taxes which the bank and its stockholders, on account of the stock held by them, were bound to pay; and that the assessment set forth in the defendant's pleas of justification was a direct violation of the contract between the State and the banking company. To this replication the defendant made no answer, and a judgment was rendered against them for want of a rejoinder.

In that state of the case, it was carried by appeal into the district court of Ohio, and there submitted to a jury upon the plea of not guilty, and a verdict was rendered for the plaintiff. But after that judgment, the verdict was arrested by the district court, upon the ground that the matter set forth in the plaintiff's replication was no answer to the defendant's pleas of justification, and that those pleas were a bar to the plaintiff's recovery.

The case was then carried by appeal to the supreme court, and the judgment of the district court was affirmed, on the express ground that the 60th section of the bank charter was not a contract between the State and the bank, within the meaning of that clause of the constitution of the United States which provides that "no State shall pass any law impairing the obligation of contracts;" and that the act of the general assembly, passed the 13th April, 1852, for the assessment and taxation of all property in the State, according to its true value in money, was binding on the Bank of the State of Ohio, and its branches.

Having given the case in its pleading and proceedings in all their irregularities, we now proceed to state what have been the uniform decisions of the supreme court of the United States in respect to the protective clause against legislation by the States

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impairing the obligation of contracts, and particularly of that legislation of Ohio comprehending the present controversy, which its supreme court has affirmed to be constitutional, and which [ \* 446 ] is now regularly before us for review \* and reversal, in conformity with previous decisions of this court.

First, as to the decisions of this court in respect to the power of a State legislature to bind the State by a contract, we refer to the case of *Billings v. The Providence Railroad Bank*, that of the *Charles River Bridge Company*, and that of *Gordon v. The Appeal Tax Court*, and to the case of *The Richmond Railroad Company v. The Louisa Railroad Company*, (13 How. 71.) The last, in principle, was identical with that of *The Charles River Bridge v. The Warren Bridge*. The opinion of the majority of the court was put upon the ground that the legislature of a State had a right to bind the State by such a contract, and the three dissenting judges in that case were of the opinion, as the report of the case will show, not only that the legislature might bind the State by such a contract, but that it had bound it, and that the charter of the Louisa Railroad Company violated the contract, and impaired its obligation. This court has also decided that the charter of a bank is a franchise, which is not taxable as such, if a price has been paid for it, which the legislature has accepted with a declaration that it was to be in lieu of all other taxation. *Gordon v. Appeal Tax Court*, (3 How. 133.) The rule of construction in such a case is, that the grant of privileges and exemptions to a corporation are to be strictly construed against the corporators, and in favor of the public; that nothing passes but what has been granted in clear and explicit terms; and that neither the right of taxation, nor any other power of sovereignty, will be held by this court to have been surrendered, unless such surrender has been expressed in terms too plain to be mistaken.

In respect to the power of a State legislature to exempt persons, corporations, and things from taxation, and to bind the State by such enactment, we refer to the case of *New Jersey v. Wilson*, (7 Cranch, 164.) The circumstances of that case were these: A legislative act declaring that certain lands should be purchased for the Indians, and that such lands should not be thereafter subject to taxation, it was decided by this court, that such language made a contract between the \*Indians and the State, which could not be rescinded by a subsequent legislative act, and that such a repealing act was void under that clause of the constitution of the United States prohibiting the States from passing any law impairing the obligation of contracts. The case

shows what has been the fidelity of this court to the constitution in this particular. The illustration will be more decisive by briefly stating the circumstances of the case. In 1758 the State of New Jersey purchased the Indian title to lands in that State, and as a consideration for the purchase, bought a tract of land as a residence for the Indians, having previously passed an act declaring that such lands should not be subject thereafter to any tax by the State, any law or usage, or law then existing, to the contrary notwithstanding. The Indians, from the time of purchase, lived upon the land until the year 1801, when they were authorized, by an act of the legislature, to sell the land. This last act contained no provision in respect to the future taxation of the land. Under it, the lands were sold. In October, the legislature repealed the act of August, 1758, which exempted the lands from taxation, subjecting them to taxes in the hands of the purchasers. They were assessed and demanded; the purchasers resisted; and, upon the trial of the case, the taxes imposed by the act of 1804 were declared to be unconstitutional. This court then said, the privilege, though for the benefit of the Indians, is annexed by the terms which create it to the land itself, and not to their persons. In the event of a sale, the privilege was material, because the exemption from taxes enhanced its value.

Our reports have other cases of a like kind, passed upon by this court with like results. In every case, the vital importance of a State's right to tax was considered, and the relinquishment of it by a State has never been presumed. The language of the court has always been cautious, and affirmative of the right of the State to impose taxes, unless it has been relinquished by unmistakable words, clearly indicating the intention of the State to do so. This court has always said and acted upon it: "We will not say that a State may not relinquish its right to tax in particular cases, or that a \*consideration sufficiently valuable to in- [\* 448] duce a partial increase of it may not exist, but as the whole community is interested in preserving it undiminished, it has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of a State to abandon it does not appear."

We are aware, that the very stringent rule of construction of this court, in respect to taxation by a State, has not been satisfactory to all persons. But it has been adhered to by this court in every attempt hitherto made to relax it; and we presume it will be, until the historical recollections, which induced the framers of the constitution of the United States to inhibit the States from pass-

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ing any law impairing the obligation of contracts, have been forgotten. This court's view of that clause of the constitution, in its application to the States, is now, and ever has been, that State legislatures, unless prohibited in terms by State constitutions, may contract by legislation to release the exercise of taxing a particular thing, corporation, or person, as that may appear in its act, and that the contrary has not been open to inquiry or argument in the supreme court of the United States.

This brings us to the consideration of the legislation of Ohio, upon which its supreme court has passed judgment on the case now before us.

It has been decided three times by this court, that the 60th section of the charter of the State Bank of Ohio was a contract between the State and the bank within the meaning, and entitled to the protection of the constitution of the United States against any law of the State of Ohio impairing its obligation; and that the acts of Ohio, upon which the supreme court of Ohio has assumed the State's right to tax the State Bank of Ohio and its branches differently from the tax stipulated for in the 60th section of the charter, were and are unconstitutional and void.

The first case in the order of time is that of the Piqua Branch, &c., &c., v. Knoop. In that case, we declared the act of 1845 to be a general banking law, the 59th section of which required the bank to make semi-annual dividends, and that the 60th section required the officers of the banks to set off six [ \* 449 ] \* per cent. of such dividends in the manner prescribed in it for the use of the State, which sum the State had consented to accept, and would accept in lieu of all taxes to which the banks or their stockholders might otherwise be subject; that the act was a contract, fixing the amount of taxation, and not a rule or law prescribed until changed by the legislature of the State of Ohio; that the act of 1851, to tax banks and other stocks the same as property, was an act to increase the tax upon the banks, and that such law being a violation of the State's contract, that the banks were not bound to pay the same; that a municipal corporation, in which is vested some portion of the administration of the government, may be changed at the will of the legislature; but that a bank, in which stock is held by individuals, is a private corporation, and its charter is a legislative contract, which cannot be changed without its consent; and in connection, this court again repeated that, by the 60th section of the act of 1845, the State bound itself by contract to levy no higher tax than was mentioned in it upon the

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bank, should it be organized under that law during the continuance of their charters.

Two years afterward, in 1855, the particulars of the decision, as they have just been stated, were reaffirmed. It also then added, that a stockholder in a corporation has a remedy in chancery against the directors of a bank, to prevent them from doing acts which would amount to a violation of its charter, or to prevent them from any misapplication of its capital, which might lessen the value of the shares, if the acts intended to be done shall amount to what the law deems to be a breach of trust; also that a stockholder in a bank or other corporation had a remedy in chancery against individuals, in whatever character they profess to act, if the subject of complaint is an imputed violation of a corporate purchase, or the denial of a right growing out of it, for which there is not an adequate remedy at law; and if the stockholder who complains be a resident of another State than that in which the bank or corporation has its *habitat*, that he may then resort to the courts of the United States for a remedy.

That the fact, that the people of the State of Ohio had, in the \*year —, adopted a new constitution, in which it [ \* 450 ] was declared that taxes should be imposed upon banks in the manner provided for by the act of 13th April, 1852, cannot be applied to the State Bank of Ohio or its branches, without a violation of the contract contained in the charter of 1845. Having now noticed every essential point made in the argument in support of a claim, to subject the Bank of the State of Ohio and its branches to a higher rate of taxation than that stipulated in its charter, we will close this opinion in the language of the chief justice, in Knoop's case: "I think, that, by the 60th section of the act of 1845, the State of Ohio bound itself by a contract to levy no higher tax than the one there mentioned upon the banks or stocks of the banks organized under that law during the continuance of their charters. In my judgment, the words used are too plain to admit of any other construction."

We shall direct a reversal of the judgment of the supreme court of Ohio in this case, and direct a mandate to be issued accordingly.

Judgment of the supreme court of Ohio reversed.

Washington v. Ogden.

JOHN A. WASHINGTON and W. F. TURNER, Plaintiffs in Error, v. M. D. OGDEN.

1 Black, 450.

## CONSTRUCTION OF CONTRACT—PLEADING.

1. An agreement to sell land for a specified sum, and on the payment of a part of the price to make a deed to the vendee, is a covenant to convey a good and perfect title free from all incumbrances.
2. In a suit by the vendor on such a contract for the purchase money, it is not a sufficient averment that he had been ready and willing to make a deed. It is necessary that it should be also averred that such a deed would convey a good and perfect title.
3. In the appellate court it cannot be presumed, in aid of the verdict, that the sufficiency of the plaintiffs' title was proved, because the record shows affirmatively that no such proof was given.
4. The agreement was also expressly "to be dependent on the surrender and cancelment of said contract with Wright," a previous contract of sale of the same land as record. This was not done within the time at which the cash payment was to be made, and though the declaration avers that it was complied with, the proof is wholly insufficient. It was therefore error in the court to instruct the jury that by a verbal arrangement between Clapp, purchaser from Wright, and Wright himself and the vendor, the contract with Wright was delivered up. This was not a surrender and cancelment within the meaning of plaintiffs' covenant.

WRIT of error to the circuit court for the northern district of Illinois. The case is stated in the opinion.

*Mr. Arrington*, for plaintiffs.

*Mr. Fuller* and *Mr. Carlisle*, for defendant.

[ \*455 ] \*Mr. Justice GRIER delivered the opinion of the court.

The very numerous exceptions to the sufficiency of the pleadings, and the correctness of the instructions given by the court, all depend on the construction given to the covenants of the agreement, which is the foundation of the suit. It is in the following words:

"CHICAGO, June 20, 1859.

"We will give M. D. Ogden, trustee Chicago Land Company, sixty-seven thousand and five hundred dollars for the property described in the John S. Wright contract with the trustees of the Chicago Land Company, dated June 4, 1855, or thereabouts, and pay for the same as follows: thirty-five thousand in cash within the next sixty days, and the balance in one, two, and three years, in equal installments, with six per cent. interest, payable annually.

• It is understood that it is all payable at the office of Ogden, Fleet-

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wood & Co., in Chicago. In the event of our being deprived of the water front on block 35, Elston's addition to Chicago by Robins, a difference in the purchase-money shall be made, corresponding to the value of the property lost. The said M. D. Ogden, trustee, &c., agrees to sell to John A. Washington and Wm. F. Turner, both of Virginia, the above described property for the said sum of sixty-seven thousand five hundred dollars, payable as above; and on the payment of the said thirty-five thousand dollars cash, within the next sixty days, he will make a deed to said Washington and Turner for said property, and take a bond and mortgage on the same, for payment of the balance of thirty-two thousand five hundred dollars, to be paid as above stated. This agreement is to be dependent on the surrender and cancelment of said contract with said Wright."

It is evident that the covenants of this contract are not independent. They are concurrent or reciprocal, constituting mutual conditions to be performed at the same time. The vendor is not bound to convey, unless the money due on the first \*installment be paid; nor is the purchaser bound to pay [\* 456] unless the vendor can convey a good title, free of all incumbrance. The agreement shows that the vendor at that time was not able to give a satisfactory title, having a deed on record, by which he had covenanted to convey the same land to another. It is therefore made a condition precedent by this agreement, that this previous contract should be surrendered and canceled. The declaration avers that the contract with Wright was surrendered and canceled on the 28th day of June, and that the plaintiff has been ever ready and willing to receive the money at the time and place, and "*to deliver to defendants a deed of the property.*" But there is no averment in the *narr.* that the plaintiff had a good and sufficient title, free from all incumbrance, which he was ready and willing to convey. It is true, the words of his covenant are, "that he will make a deed" to his vendees on receipt of the first installment. But the meaning of these words in the contract requires that the deed shall convey the land, and it is not sufficient to aver his readiness to perform, merely according to the letter of the contract. The performance must always be averred according to the intent of the parties. It is not sufficient to pursue the words, if the intent be not performed. The legal effect of a covenant to sell is, that the land shall be conveyed by a deed from one who has a good title, or full power to convey a good title.

A sale, *ex vi termini*, is a transfer of property from one man to another. It is a contract to pass rights of property for money.

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This defect in the declaration cannot be cured by the verdict, under a presumption that the facts necessary to support it have been proved before the jury, because it appears by the record that no such proof was offered to aid the insufficient averments of the declaration.

It appears, also, that the averment with regard to the surrender and cancelment of the contract with Wright, even if sufficiently pleaded, was wholly without proof to support it, and that the court instructed the jury that they might presume it without proof. It is clearly a condition precedent, without the literal performance of which the purchasers were not bound to pay their money.

[ \* 457 ] The vendor had, on the 4th of \* June, 1855, covenanted to sell this land to John S. Wright, on payment of certain installments. The vendors had reserved to themselves very stringent and unusual powers of declaring the contract forfeited in case of non-payment of the several installments. John S. Wright, on the third of July, 1837, by his deed, conveyed all his right and title to the premises to Timothy and Walter Wright. This deed was recorded 13th July, 1837.

T. & W. Wright, on the 3d day of December, 1857, conveyed to James Clapp, and the deed was recorded on the 12th of December, 1857. These deeds could not be surrendered or canceled by parol. Both the original and the record should have been canceled and surrendered by act of the parties thereto under seal; if not by all, yet certainly by Clapp. This was not done. The plaintiffs in error had prepared their money. Their agent called on Ogden to obtain an abstract of the title, and a proper surrender or release of the outstanding title, and was instructed to prepare proper bonds and a mortgage. Ogden promised to attend to having a proper surrender executed, but none was shown or tendered to the agent; on the contrary, Ogden handed him a mortgage and notes to be sent to the purchasers to be executed by them. They refused to sign instruments in that form, and returned them to their agent. He returned them to Ogden, stating, among other reasons, that they expected a *proper release or surrender* of the outstanding title, and that in the absence of such a release Ogden could not make a good title nor give possession. A second mortgage and bonds were then drawn and sent to the purchasers by Ogden, which were also objected to, and another *promise* given, "that the *release should be attended to.*"

But no such deed of release or surrender was made, executed, or tendered to the purchasers within the sixty days. Clapp did not execute a release till after the 1st of September, which was ante-



dated as of the 15th of August. On this evidence, which was uncontradicted, it was clearly the duty of the court to have instructed the jury that the plaintiffs below had not made out a case which entitled them to a verdict; on the contrary, the court instructed the jury as follows:

\* "2d. By the terms of the John S. Wright contract, if [ \* 458 ] default were made in the payment of the installment due in 1859, it was competent for the Messrs. Ogden, at their option, to declare it forfeited and at an end as a contract for conveyance, and the land might be granted to another. No release or conveyance in writing by Wright or his assignee was absolutely necessary in such case, in order to put an end to the contract to convey. Strictly speaking, Wright, having parted with his interest in the land to Clapp, had no power over the contract; but if he with the acquiescence and consent of Clapp, after default of payment, delivered the contract to Mr. Ogden, and it was the agreement and understanding of all parties in interest that the contract was at an end, then it might be regarded as substantially surrendered and canceled. That the offer of the property for sale, and a declaration of forfeiture after default of payment, might be sufficient, as showing the exercise of the option on the part of the grantor."

This instruction was excepted to by defendants. It was a very grave error to instruct the jury that the acquiescence of Clapp, and the mutual understanding of the parties to that transaction, might be regarded by the jury as an actual cancellation and surrender as between the parties to this suit. Acquiescence expressed by parol, and mutual understanding that a title should be released, cannot be made a substitute for a deed of release or surrender, executed and recorded. Deeds under seal can be surrendered and canceled only by other deeds under seal. No prudent man would accept a title with full notice on record, and knowledge of such an outstanding title. This contract, by its plain terms, is "dependent on such surrender and cancelment being made within the sixty days." It is a condition precedent, without the performance of which within the term specified, the purchaser had a just right to declare the contract annulled. To entitle the plaintiffs below to recover in this suit, the declaration should have averred that such deeds of surrender and cancellation had been duly executed; that the plaintiff had a perfect title, free of all incumbrances, and was able as well as willing and ready to convey a good title to the plaintiff on the day named in the agreement. \* But he [ \* 459 ] was not able to prove such averments, if they had been made, and his case failed both in its pleadings and its proofs; con-

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sequently there was error in ruling the demurrers of the plaintiff to the 4th, 6th, and 7th pleas of defendant in favor of plaintiffs. The pleas alleged proper matters of defense to the suit, either in whole or in part. They were sufficient on general demurrer, which goes back to the first error in pleading. And from what we have already said, the first error in pleading is found in the declaration. It is not necessary to discuss more at large the form of the pleadings, or whether the action should not have been covenant and not debt, as the plaintiff was not entitled to recover in any form of action, according to the undisputed facts in evidence.

The judgment of the circuit court reversed, and *venire de novo*.

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HAMILTON MCCOOL, Plaintiff in Error, v. SPENCER SMITH.

1 Black, 459.

EJECTMENT—NEXT OF KIN IN ILLINOIS.

1. There was no statute in the State of Illinois making the blood of bastards heritable until 1829, which was wholly prospective.
2. The statute of Virginia of 1785, which provided that bastards could inherit and transmit real estate, was passed after the northwestern territory had been conveyed by Virginia to the federal government, and was, therefore, never in force in Illinois.
3. If the act of the legislature of Illinois of February 16, 1857, can be construed as operating retrospectively, so as to make good previous conveyances by bastards, then, title takes effect as of the date of the act.
4. As the action in this case was commenced before the passage of that act, the plaintiff's title being good only by virtue of it, he cannot recover in *this* action, both by the common law and by the statute of Illinois, because he had no title at the date of its commencement.

WRIT of error to the circuit court for the northern district of Illinois. The case is stated in the opinion.

*Mr. Browning*, for plaintiff.

*Mr. Kellogg*, for defendant.

[ \* 465 ] \*Mr. Justice SWAYNE delivered the opinion of the court.  
 [ \* 466 ] This was an action of ejectment \*in the court below. Smith was plaintiff, and McCool defendant. A special verdict was found by the jury. The court rendered judgment for the plaintiff. The defendant has brought the case here by a writ of error, and is the plaintiff in error in this court.

The material facts of the case, as shown in the record, are as follows:

Polly Norris had four illegitimate children. Their names were: Alonzo Redman, Eleanor Fogg, Joseph Melcher, and Sophia Norton.

Alonzo Redman was the patentee of the land in controversy. He died without issue in the year 1825.

Joseph Melcher died without issue in the year 1814.

Eleanor Fogg died without issue in the year 1824.

Sophia Norton married Reuben Rand in the year 1816. Reuben Rand died in June, 1853.

Polly Norris died in 1837 without having had any other issue than those named.

Sophia Rand, on the 23d day of June, 1854, by her quit-claim deed of that date, duly executed, conveyed the land in controversy to Levi F. Stevens. Stevens, on the 21st of April, 1855, by a like deed of that date, conveyed the land to Smith, the plaintiff.

The first law of Illinois, making the blood of bastards heritable, was passed in 1829. This was wholly prospective, and is no otherwise material in this case than as showing the sense of the legislature of the necessity of such legislation to produce that result.

On the 12th of February, 1853, the legislature passed another law upon the same subject. It provides, that "on the death of any such person"—

His or her property shall go to the widow or surviving husband and children, as the property of other persons in like cases.

If there be no children, the whole property shall vest in the surviving widow or husband.

If there be no widow or husband, or descendants, the property shall vest in the mother and her children, and their \*descendants: the mother taking one-half; the other half [ \* 467 ] to be equally divided between her children and their descendants.

If there be no heirs as above provided, then the property shall vest "in the next of kin of the mother, in the same manner as the estate of a legitimate person."

This act also was prospective, and did not affect this case.

On the 16th of February, 1857, the legislature passed an act amending the preceding act.

The first section provides, that where any person shall have died before the passage of the amended act, leaving property, which by the provisions of that act would have descended to any illegitimate child or children, such child or children shall be deemed the owner of such property, "the same as if such act had been in force at the time of such death," unless the title shall have been "vested in

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the State, or other persons, under the law of this State concerning escheats."

The second section provides, that in all the cases before specified where such illegitimate child has conveyed the property by deed, duly executed, "or when the same would have descended by the provisions of the act to which this is an amendment, and shall have been conveyed by deed by the person to whom the same would have descended, then such conveyances shall vest the same title thereto in the grantee, as by this act is vested in such illegitimate child from the date of such deed, and in all actions and courts such grantee shall be deemed to be the owner of such real property from the time of the date of the conveyance."

This act took effect from its date.

It is claimed by the counsel of the defendant in error that, "at the time of the cession of the northwestern territory to the general government by the State of Virginia, the statute of that State directing the course of descents, passed in 1785, and which took effect January 1st, 1787, provided as follows:

"In making title by descent, it shall be no bar to a party, that any ancestor, through whom he derives his descent from the intestate, is or hath been an alien. *Bastards also shall be capable of inheriting, or of transmitting inheritance on the part of* [ \* 468 ] *\* their mother, in like manner as if they had been lawfully begotten of such mother.*"

It is claimed, also, that this statute continued in force in Illinois during the whole period of her territorial existence, and after she became a State to a period later than the death of Alonzo Redman.

To this proposition there is a conclusive answer.

The general assembly of Virginia, by a resolution of the 20th of October, 1783, authorized her delegates in Congress to execute a deed, ceding to the United States all her "right, title, and claim, as well of soil as jurisdiction," to the territory northwest of Ohio. The deed was executed on the 1st of March, 1784. From that time, except as to the reservations expressed in the deed, which in nowise affect the question here under consideration, Virginia had no more claim to, or jurisdiction over that territory, than any other State of the Union.

It is also claimed, that the act of the legislature of Illinois of 1819, which was in force at the time of the death of Alonzo Redman, gave his estate, under the circumstances, to "the next of kin," and that applying the civil law interpretation to those terms, his mother was such "*next of kin*," and hence took an estate of inheritance in the land in question under that act. Breese's Re-

ports, 136, *Hays v. Thomas*, is relied upon as authority for this proposition. In that case, the principle was applied as between legitimate persons claiming under a legitimate decedent. The same remark applies to *Hillhouse v. Chester*, (3 Day's Rep. 166;) which the case of *Hays v. Thomas* followed.

In *Hillhouse v. Chester*, the court say :

"It cannot be pretended that the plaintiff is *next of kin* to Mary, if we give the same construction to the words which they have received in the English law."

"It has always been held that, to ascertain who this person is, the computation is to be made *according to the rules of the civil law*." "Our statute, which directed that, in such an event, the estate of the intestate, both real and personal, should go to \*the *next of kin*, was enacted at a time when the aforesaid [ \* 469 ] statute of Car. II, and the construction given to it, was perfectly known. It is a sound rule, that whenever our legislature use a term without defining it, which is well known in the English law, and there has been a definite appropriate meaning affixed to it, they must be supposed to use it in the sense in which it is understood in the English law."

The class of adjudications in England referred to were never claimed to affect the legal condition of bastards there. How can the same principle, decided in *Hays & Thomas*, have that effect in Illinois?

It is also claimed that the legal status of Alonzo Redman, at the time of his death, is to be determined by the civil and not by the common law; and it is insisted, that by the provisions of the civil law legitimate and illegitimate children stood upon a footing of equality. We have not deemed it necessary to examine the provisions of the civil law referred to, because, in our judgment, they have no application to the subject. When Alonzo Redman died, the common law of England was in full force in the State of Illinois.

The ordinance of 1787 guaranteed that "judicial proceedings" in the territory should be "according to the course of the common law." In 1795, the territorial governor and judges adopted that law for the territory.

By an act of the legislature of Illinois, of the 4th February, 1819, it was provided:

"That the common law of England, and all statutes or acts of the British parliament made in aid of the common law prior to the 4th year of the reign of King James the 1st, excepting the second section of the sixth chapter of XLIII Elizabeth, the eighth chapter

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XIII Elizabeth, and ninth chapter XXXVII Henry VIII, and which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered of full force until repealed by legislative authority."

This act has been in force ever since its date:

3 Scam. 301, Penny v. Little; idem, 120, Boger v. Sweet; id. 396, Stewart v. The People; 5 Gil. 130, Seely v. Peters.

[ \* 470 ] \*The Wills act of 1829, section 47, that of 1845, section 53, and the act of 1853, all, by the clearest implication, recognize the heritable disabilities of the illegitimate in the absence of enabling statutes. Such is also the theory of the act of 1857.

By the rules of the common law, terms of kindred, when used in a statute, include only those who are legitimate, unless a different intention is clearly manifested. This is conceded by the counsel for the defendant in error. The proposition is too clear to require either argument or authority to sustain it.

The legal position of Alonzo Redman, at the time of his death, was what the common law made it. In the eye of that law, he was *filius nullius*. He had neither father, mother, nor sister. He could neither take from, nor transmit to, those standing in such relations to him, any estate by inheritance.

These views bring us to the conclusion that no title to the land in controversy was ever vested in Polly Norris, and none in Sophia Rand, nor in the plaintiff below, until the act of February 16, 1857, took effect.

This suit was commenced on the 2d day of July, 1855. Conceding that the act of 1857 vested in the defendant in error a valid title, can he recover in *this action*? The rule of the common law is inflexible, that a party can recover in ejectment only upon a title which subsisted in him at the time of the commencement of the suit. Johnson v. Jones, decided at this term. So regardful has the State of Illinois been of this principle, that she has embodied it in a statute. Her ejectment act provides that—

"No person shall recover in ejectment unless he has, at the time of commencing the action, a valid subsisting interest in the premises claimed, and a right to recover the same, or to recover possession thereof, or some share, interest, or portion thereof, to be proved or established at the trial."

If the plaintiff below can succeed in this action, it must be because the act of 1857 impliedly repeals this provision as to this case. If there were no such statutory provision, the act of 1857, being in derogation of the common law, would be construed strictly. "A

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repeal by implication is not favored." "The leaning of the courts is against the doctrine, if it be \*possible to reconcile the two acts of the legislature together." Sedg. Stat. and Cons. Laws, 127; 4 Gill and J. 1, Canal Co. v. Railroad Co.; 5 Hill, 221, Bowen v. Lease; 2 Barb. S. C. R. 316, Williams v. Potter.

We see nothing in the act of 1857 which indicates a purpose to contravene this common law principle and supersede this statutory provision as respects this action. *It is possible* to reconcile the two acts. It may well be that the legislature intended to vest the title retrospectively for the purpose of giving effect to mesne conveyances and preventing frauds, without intending also to throw the burden of the costs of an action of ejectment, then pending, upon a defendant, who, as the law and the facts were at the commencement of the action, must have been the successful party. A stronger case than this must be presented to induce us to sanction such a result by our judgment. If the plaintiff below can recover, it must be in action brought after the 16th of February, 1857. He cannot recover upon a title acquired since the commencement of this suit.

In holding otherwise, the court below committed an error.

Several other very important questions have been discussed by the counsel of the parties. We have not considered them, and intimate no opinion in regard to them.

The judgment below must be reversed, and the cause remanded, with instructions to enter a judgment for the plaintiff in error upon the special verdict.

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### VERDEN, Plaintiff in Error, v. COLEMAN.

1 Black, 472.

#### JURISDICTION OVER JUDGMENTS OF STATE COURTS.

1. The defense to a mortgage foreclosure suit in a State court was, that to part of the land for which the mortgage was given the plaintiff had no title, because the land for which he had a patent from the government had been assigned to an Indian under the treaty. This gives no jurisdiction, because the decision was in favour of the title set up under the United States.
2. The claim of the Indian's right under the treaty can only give jurisdiction when assailed by some one claiming under it, and not when set up by a stranger. Henderson v. Tennessee, 10 H. 311, (18 Curtis, 405.)

WRIT of error to the supreme court of Indiana.

*Mr. Gillet and Mr. Mace*, for plaintiff.

*Mr. Baird*, for defendant.

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The Franklin Branch Bank v. The State of Ohio.

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[ \* 473 ] \*Mr. Justice GRIER delivered the opinion of the court.  
Does this case come within the 25th section of the judiciary act?

The bill filed in the State court is for the foreclosure of a mortgage. The defense set up by the mortgagor was, that the consideration of the note which the mortgage secured was the purchase money of the land mortgaged; that the title to one of the tracts was through a patent of the United States to Hannamah Hewett; that this patent did not convey a good title, because in 1832 the United States concluded a treaty of purchase of a large tract of country with the Pottawatomie Indians; that by the terms of this treaty a section was reserved for an Indian named To-pen-na-be, to be located under direction of the President; that before the date of the patent to Hewett for this quarter section the whole section, including it, had been assigned to To-pen-na-be.

The patent was, nevertheless, granted to Hewett because of a prior equity by settlement.

The supreme court of Indiana decided that the patent to Hewett was a valid grant of the land. This decision will not  
[ \* 474 ] \*bring the case within the 25th section. Nor can we claim it because of the title set up under the treaty with the Indians, because neither To-pen-na-be nor any one claiming under him is party to the suit.

This court has decided in the cases of *Owings v. Norwood*, 5 Cranch, 344, and of *Henderson v. Tennessee*, 10 How. 311, that "in order to give jurisdiction to this court the party must claim the title under the treaty for himself, and not for a third person, in whose title he has no interest."

This case is, therefore, dismissed for want of jurisdiction.

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THE FRANKLIN BRANCH BANK, Plaintiff in Error, v. THE STATE OF OHIO.

1 Black, 474.

CONSTITUTIONAL STATE TAX IMPAIRING OBLIGATION OF CONTRACT.

The court reasserts the proposition that the sixtieth section of the act of the Ohio legislature incorporating the State Bank was a contract which was impaired by the act increasing the tax on the banks. *Jefferson Branch Bank v. Skelly*, ante, p. 534.

WRIT of error to supreme court of Ohio.

*Mr. Stanbery*, for plaintiff.



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No argument for defendant.

\*Mr. Justice WAYNE delivered the opinion of the court. [\* 475]

The single question in this case is, whether the 60th section of the statute of Ohio, entitled "An act to incorporate the State Bank of Ohio and other banking companies," passed February 24, 1845, constitutes a contract for a fixed amount and mode of taxation; and whether the statute of Ohio, passed April 5, 1859, entitled "An act for the assessment and taxation of all the property in this State, and for levying taxes thereon, according to its value in money," impairs that contract.

The amount of tax due from the Franklin Branch, &c., &c., upon the basis of the 60th section, was \$1,216.42 for the year 1859; the amount assessed against it, under the act of the 24th February, 1855, was \$4,076.30 for the same year. The case, of course, turns upon the true construction of the 60th section; and this court has just said, in the case of the Jefferson Branch of the State Bank of Ohio, &c., v. Skelly, (No. 143,) that the 60th section contains a contract for a fixed rule of taxation, and that the act of April 15, 1853, which attempts to assess a larger tax, by a different rule, was unconstitutional. See also the cases of *Knoop v. Piqua Bank*, (16 Howard, 369;) *Dodge v. Woolsey*, (18 Howard, 331;) *Mechanics and Traders' Bank v. Debolt*, (ibid. 380.) In all of these cases this court held, that the 60th section was a contract, and that the various State laws, which attempted to change the rule of taxation fixed by such contract, were void.

We affirm again the unconstitutionality of the law of Ohio under which the tax was assessed and levied against the Franklin Bank, and direct the reversal of the judgment of the supreme court of the State of Ohio now before us by a writ of error.

The clerk of this court will, under the direction of this court, issue the proper mandate.

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F. B. LEONARD and others, Plaintiffs in Error, v. C. DAVIS and others.

1 Black, 476.

CONSTRUCTION OF CONTRACTS—SAW-LOGS—WHEN TITLE VESTS IN VENDEE.

1. The main question in this case is whether the contract was executed—whether the title passed, or it was an agreement for a future sale. The court examines the rule of law, and holds that in this case of a contract of sale of saw-logs at various points in the stream down which they are to be floated it was a sale in pre-

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sent, because it was a sale of all the logs at prices fixed by the agreement, and nothing remained for the vendors to do—the amount to be ascertained by a boom-master, whose duty it was to scale the logs.

2. Nor was this principle affected by the fact that the logs were to be raised upon the boom and scaled at various times.

WRIT of error to the circuit court for the district of Michigan.  
The case is stated in the opinion.

*Mr. Russell*, for plaintiffs.

*Mr. Van Arman*, for defendants.

[ \* 477 ] \* Mr. Justice CLIFFORD delivered the opinion of the court.

This is a writ of error to the circuit court of the United States for the district of Michigan.

Some brief reference to the pleadings in the cause will be necessary, in order that the precise nature of the controversy may be clearly understood. It was an action of assumpsit brought by the present plaintiffs, and the declaration contained two special counts, framed upon a certain written agreement signed by the parties.

According to the allegations of the first count, the defendants, on the 6th day of November, 1856, bought of the plaintiffs a certain described parcel or lot of pine saw-logs, situated in and about the Muskegon river and lake, in the county of Ottawa, and State of Michigan, and the claim as there made was for the entire amount agreed to be paid as the consideration for the purchase and sale of the lumber.

Referring to the second count, it will be seen that it was, in all respects, substantially the same as the first, except that the pleader assumed throughout that the agreement between the parties was executory; and, consequently, alleged that the plaintiffs agreed to sell, and that the defendants agreed to purchase the same parcel or lot of pine saw-logs as that described in the first count, averring readiness to perform on the part of the plaintiffs, and default on the part of the defendants.

[ \* 478 ] \* Process was duly served upon the defendants, and on the 30th day of March, 1858, they appeared and pleaded the general issue, giving notice in writing at the same time of certain special matters to be given in evidence under that plea.

Among other things, they alleged in the notice, that not more than seven hundred thousand feet of the saw-logs agreed to be furnished by the plaintiffs ever came to their hands, and that not more than one-fourth part of the quantity so received was merchantable; and that, through that default and wrong of the plaintiffs, they,

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the defendants, suffered damages to the amount of five thousand dollars, for which amount they claimed to recoup the damages demanded by the plaintiffs. They also averred, that the plaintiffs were indebted to them in the sum of three thousand dollars for money lent and money paid and advanced ; and they also gave notice that they would prove such indebtedness at the trial, by way of set-off to the damages claimed by the plaintiffs, as more fully set forth in the transcript. Such was the substance of the pleadings on which the parties went to trial.

Before proceeding to state the evidence, and the rulings and instructions of the court, it becomes necessary to advert to the situation of the saw-logs, and the surrounding circumstances at the time the agreement was made. Both parties agree that the lot or parcel of logs in controversy had been cut in the forest during the winter preceding the date of the contract by one A. B. Furnam, and had been by him transported to the river and upper waters of the lake, and driven down the same to the association boom, so called, where the larger portion of the logs were situated at the time the agreement was executed. Divers persons own timber lands bordering on the upper waters of that lake, and during the winter season of the year cut saw-logs, either for sale or to be transported over those waters to their mills, to be manufactured into boards. Such logs are usually branded with the initials of the owner's name, or some other mark by which the property of one owner may be distinguished from that of another ; and all the logs thus collected during the winter season, although belonging to different individuals, are floated down the river during the spring \* freshet in [ \*479 ] one "drive," so called, and secured in the association boom, which is in the lake, and is large enough to contain the whole quantity, and afford ample space to enable the different owners to select their own marks and arrange the logs in rafts to be transported to their private booms.

Claim was made by the plaintiffs for the entire amount of the consideration agreed to be paid for the logs specified in the contract. To maintain the issue on their part, the plaintiffs introduced the contract described in the declaration, and offered evidence tending to prove the situation and quantity of the logs ; and that the defendants, or one of them, had admitted that they had neglected to measure and scale the logs according to the agreement. One of the defendants was the treasurer of the association or incorporation owning the boom, where the logs, or the principal portion of them, lay at the time the contract was made.

Prior to the date of the contract, the same defendant had pre-

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sented a draft to the plaintiffs for the price or charge of driving down the river and into the boom of the association a certain quantity of saw-logs, equal in board measure to fourteen hundred and forty-four thousand feet. Said logs belonged to the plaintiffs, and they offered the draft, with the receipt of the defendant thereon, to show that the defendants, or some of them, had knowledge of the quantity and locality of the logs at the date of the agreement.

To the admission of that evidence the defendants objected, and the court excluded it, and to that ruling the plaintiffs excepted. Various other exceptions also were taken by the plaintiffs to the rulings of the court in the course of the trial, to which more particular reference will presently be made.

Five prayers for instruction were presented by the plaintiffs, but the court refused the entire series, and instructed the jury substantially as follows: That the contract declared on was executory; that the title to the logs did not pass till after admeasurement; that admeasurement was equally for the benefit of both parties; and that the boom-master was made the common agent for that purpose. That if the jury found from the evidence that it was

[ \* 480 ] impracticable for the boom-master to do \*the scaling alone, and it was the custom of the association for him to have assistants, then the scaling in this case might be lawfully done by such assistants under his orders. That it was equally incumbent upon the plaintiffs and defendants to have the logs scaled and measured, and that the plaintiffs could only recover for such logs as had been scaled and come to the possession of the defendants. That the contract imported a warranty that the logs were merchantable, and that the defendants were entitled to a reasonable opportunity to ascertain the quality of the logs. That if the jury found that the quality could not be determined till after the logs had been rafted up and taken to the defendant's boom, and then only by sawing them up, or chopping into them, they, the defendants, had a right to do so; and further, that if the jury found that the unmerchantable logs were entirely worthless, the defendants were entitled to recoup their damages for such defects, without returning the logs, or giving notice to the plaintiffs.

Under the instructions of the court, the jury returned their verdict in favor of the defendants, and the plaintiffs excepted both to the refusal of the court to instruct as requested and to the instructions given.

Comparing the terms of the contracts with the instructions given to the jury, it is obvious that the former was misconstrued by the court, and that injustice has been done to the plaintiffs.

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Referring to the contract, it will be seen that the first sentence thereof declares that the defendants "bought of" the plaintiffs "a quantity of pine saw-logs, got out last winter by A. B. Furnam, supposed to be about fourteen hundred and forty-four thousand feet, in board measure, at the rate of four dollars and fifty cents per thousand for those afloat in the booms and bayous near the head of the lake, and four dollars and twenty-five cents per thousand feet for those on the bank, or in marsh near the lake and boom."

All of the logs sold were to be counted, measured, and scaled by the boom-master, meaning the person in charge of that business at the association boom, where the logs, or the principal portion of them, were situated when the contract was \*made, or by such other person as the parties might agree [ \* 481 ] on, as the logs were rafted up preparatory to be transported to the private boom of the defendants.

Recurring again to the agreement, it will be seen that it bears date on the sixth day of November, 1856, and by its terms the defendants were to pay for all the logs rafted up that fall, on the fifteenth day of December following; and for all such as were not rafted up until the next spring, they were to pay monthly at the end of each month during the rafting season of the succeeding year. But it is evident that the parties well understood, that a certain portion of the logs included in the sale would remain back, even after the close of the next rafting season; and they accordingly provided that the balance, not then rafted up, should be settled for by the defendants as soon as they could be measured and the "scaling" completed.

By the terms of the contract, the defendants were to take all the merchantable logs in the described lot or parcel; and inasmuch as the time and amount of the payments would be affected by the promptitude or negligence of the defendants in rafting up the logs, it was expressly stipulated that they should raft up and secure as many of the logs as they could that fall, and as many as possible of the residue during the next spring, before the annual "drive" came down.

Beyond question these provisions were inserted in the contract for the benefit of the plaintiffs, and it is quite obvious that they were necessary to the protection of the rights of the plaintiffs, because the defendants were not required to make payments any faster than they could raft up and secure the logs, so as to render them available for the purpose for which they were purchased. Such of the logs as remained back, after the annual "drive" of the succeeding spring came down, were to be scaled where they lay, whether on

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the banks, in the booms or bayous, and were to be paid for by the defendants at the contract price, without further delay to raft them up. Whether the logs were merchantable or not, was to be determined by the boom-master, who was specially designated in the contract to count, measure, and scale them for the parties. He [ \* 482 ] might perform that duty himself, or if he had deputies \* who usually assisted him in performing that work, and that custom was known to these parties at the time the contract was made, then he might properly cause the work to be done by such deputies under his direction; and such a performance of the duty assigned to him in the contract would be a lawful performance of the same, and would be obligatory upon both of these parties.

All the logs, however, were to be counted, measured, and scaled by the boom-master, or such other person as the parties might agree on; and unless the boom-master had regular deputies who were accustomed to assist him in such duties, and that custom was known to the parties at the time the contract was made, then it is clear that the work could only be done by the person designated in the contract, unless the parties substituted another in his place.

Merchantable logs only were bought and sold by the parties, but it is a great mistake to regard that provision as a warranty of the logs on the part of the plaintiffs. Unless the parties were destitute of all experience, they must have known that in so large a lot of logs there would be some, and perhaps many, that would not scale as merchantable; and it was doubtless from that consideration that the provision was inserted, that the defendants should take all of that description, and, of course, they were not bound to take any of inferior grades. Regarded in that light, it is evident that the provision was for the benefit of both the seller and purchaser, as it furnished a clear and unmistakable description of what was bought and sold: we say bought and sold, because it is evident from what has already been said that the title to the logs passed to the defendants. Most of the logs were in the association boom at the time the contract was made; and as they were floating in the water, the law did not require an actual delivery, in order to vest the title in the defendants. While floating in the water, they were only in the constructive possession of the owner; and, under such circumstances, a symbolical delivery is all that can, in general, be expected, and is amply sufficient to pass the title. *Ludwig v. Fuller*, (17 Me. 166;)

*Boynton v. Veazie*, (24 Me. 288; ) 2 Kent's Com. 492; [ \* 483 ] *Macomber v. Parker*, \* (13 Pick. 175; ) *Hutchings v. Gilchrist*, (23 Vt. 88; ) *Gibson v. Stevens*, (8 How. 384.)

When the terms of sale are agreed on, and the bargain is struck,

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and everything the seller has to do with the goods is complete, the contract of sale, says Chancellor Kent, becomes absolute as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vests in the buyer. He is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery, or the time of payment. But if the goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of property vests at once in him. 2 Kent's Com. (9th ed.) 671; Bradeen v. Brooks, (22 Me. 470;) Davis v. Moore, (13 Me. 427.)

Nothing in fact remained to be done in this case, so far as the sale and purchase were concerned. Defendants bought and plaintiffs sold, without condition or reservation, and the measurement was simply to ascertain the amount to be paid by the defendants. Sellers had nothing to do but to receive the agreed price, unless the boom-master refused to act, which contingency did not happen him in the case. Cushman v. Holyoke, (34 Me. 292;) Riddle v. Varnum, (20 Pick. 280.)

It is clear, therefore, that the title in the logs passed to the defendants at the time the contract was executed. Cunningham v. Ashbrook, (20 Mi. 553;) Cole v. Transp. Co., (26 Vt. 87.)

Having stated our views as to the construction of the contract constituting the foundation of the suit, the errors in the instructions given to the jury will be manifest without any additional explanations; and we need only say, in this connection, that they are of a character to affect the merits of the controversy, and lead necessarily to the reversal of the judgment.

Some of the rulings at the trial, to which exceptions were also taken by the plaintiffs, present, directly or indirectly, the same legal questions as those involved in the instructions given to the jury, and in respect to all such the explanations already given will furnish a proper guide at the next trial. That remark, however, does not apply to the first and third exceptions,\*which [\* 484] were well taken upon other distinct grounds. Evidence was offered under both those exceptions, tending to show the quantity of the logs, which was a material matter in dispute at the time.

It cannot be doubted that the evidence offered had some tendency to support the issue; and if so, it was the duty of the court to receive it, and allow it to be weighed by the jury. We forbear to remark upon the other exceptions, because the explanations already given as to the true construction of the contract will sufficiently demonstrate the error in the rulings.

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The United States v. Jackalow.

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In view of the whole case, we are of the opinion that the rulings and instructions of the circuit court were erroneous. The judgment is accordingly reversed, with costs, and the cause remanded, with direction to issue a new *venire*.

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THE UNITED STATES, Plaintiffs, v. JACKALOW.

1 Black, 484.

JURISDICTION OF THE CIRCUIT COURT AS TO OFFENSES ON THE HIGH SEAS—LOCALITY.

1. The circuit courts of the United States can have no jurisdiction of an offense committed within the limits of another district, but may have jurisdiction of offenses on the sea not within the limits of any other district where the offender is first brought within the limits of the district where he is tried.
2. The question whether a particular place where the offense is committed is within the boundaries of a stated district, is a question of fact to be determined by a jury, under such instructions as the court may give in construing the legal description of the boundary.
3. A special verdict which does not find whether the offense was committed within or without the jurisdiction of a stated district, is not sufficient to authorize a judgment.

THIS case comes to this court on certificate of division of opinion between the judges of the circuit court for the district of New Jersey.

*Mr. Bates*, attorney general, and *Mr. Keasley*, for the United States.

No counsel for defendant.

[ \* 485 ]     \*Mr. Justice NELSON delivered the opinion of the court.

This case comes before us on a division of opinion of the judges of the circuit court of the United States for the district of New Jersey.

The first count in the indictment charges that the prisoner, with force and arms, on the high seas, in waters within the admiralty and maritime jurisdiction, on board of an American vessel called the "*Spray*," piratically, feloniously, and violently did assault one John F. Leete, the master of the vessel, putting him in bodily fear, and did feloniously, &c., seize, take, and carry away thirty pieces of gold coin, &c., of the goods and effects of the said master, contrary to the form of the statute, &c. The indictment also avers that the district of New Jersey is the district in which the prisoner was found and first apprehended for the offense.



The jury found a special verdict, that the offense charged in the first count was committed by the prisoner on board the "Spray," which at the time was lying in the waters adjoining the State of Connecticut, between Norwalk harbor and Westchester county, in the State of New York, at a point five miles eastward of Lyons's Point, (which is the boundary between the States of New York and Connecticut,) and one mile and a half from the Connecticut shore at low-water mark.

The indictment was found under the 3d section of the act of congress of May 15, 1820, which enacts that if any person shall, upon the high seas, or in any open roadstead, or any \* haven, basin, or bay, or in any river, &c., commit the [ \* 486 ] crime of robbery in or upon any ship or vessel, or upon any of the ship's company, &c., or the lading thereof, &c., on being convicted before the circuit court of the United States for the district into which he shall be brought, or on which he shall be found, shall suffer death.

There is a proviso which declares that nothing in the section shall be construed to deprive any particular State of its jurisdiction over the offense, when committed within the body of a county, or authorize the courts of the United States to try such offenders after conviction or acquittance for the same offense in a State court.

The 2d section of the 3d article of the constitution provides that "the trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the congress may by law have directed."

A material question in this case, in view of this provision of the constitution, was, whether or not the offense was committed out of the jurisdiction of any particular State, because, if not, inasmuch as it was not committed within the State of New Jersey, the circuit court of the district of that State had no jurisdiction. That jurisdiction depends upon two facts: first, that the offense was committed out of the jurisdiction of any other of the States of the Union and, second, that the prisoner was first apprehended in the district of New Jersey.

Crimes committed against the laws of the United States out of the limits of a State are not local, but may be tried at such place as congress shall designate by law, but are local if committed within the State. They must then be tried in the district in which the offense was committed. (15 How. 488, 6th amendment of the constitution of U. S.)

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In many of the statutes prescribing offenses against the laws of the United States, there is an express limitation excluding offenses committed within the jurisdiction of a State. The acts of 1790 and 1825 are of this description.

Under these statutes the question presented in this case [ \* 487 ] could \* not arise, as the offense could not be committed within the limits of the State.

We agree, however, that the omission of the limitation in the act of 1820 constitutes no objection to the legality and force of the act, as it is competent for Congress to prescribe the punishment of offences committed on the high seas, open roadsteads, in any haven, basin, or bay, or in any river where the sea ebbs and flows, as there described, although within the limits of a State. \* But in these cases, as we have seen from the constitutional provision referred to, the indictment and trial must be in a district of the State in which the offense was committed.

Now, the special verdict finds that the offense in this case was committed upon the "Spray," lying in waters adjoining the State of Connecticut, between Norwalk harbor and Westchester county, in New York, at a place five miles eastward of Lyons's Point, and a mile and a half from the Connecticut shore. Whether this *place* thus described is out of the jurisdiction of a State or not, is not found, and is, of course, necessarily left to the court to determine. The learned judge of the district court, sitting in the circuit with the presiding judge, in a very carefully considered examination of the question, came to the conclusion that the place where the offense was committed was within the jurisdiction of New York; and it appears that two of the eminent judges of the highest court of the State of New York entertained different opinions on this question. (3 Seldon, 295.)

We have not referred to this boundary of New York for the purpose of determining it, or even expressing an opinion upon it, but for the purpose of saying that the boundary of a State, when a material fact in the determination of the extent of the jurisdiction of a court, is not a simple question of law. The description of a boundary may be a matter of construction, which belongs to the court; but the application of the evidence in the ascertainment of it as thus described and interpreted, with a view to its location and settlement, belongs to the jury. All the testimony bearing upon this [ \* 488 ] question, whether of maps, \* surveys, practical location, and the like, should be submitted to them under proper instructions to find the fact.

We do not think the special verdict in this case furnishes ground

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for the court to determine whether or not the offense was committed out of the jurisdiction of a State, and shall direct that it be certified to the circuit court, to set aside the special verdict, and grant a new trial.

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THE UNITED STATES, Appellant, v. KNIGHT.

1 Black, 488.

PRACTICE IN SUPREME COURT—REHEARING.

1. This court cannot look beyond the record as transmitted from the court below in a chancery appeal, any more than in a writ of error, with a view to affect its judgment in the case.
2. Hence, after its judgment is pronounced, it will not hear a motion founded on affidavits of newly-discovered evidence to open the decree here and remand the case for a further hearing in the court below.
3. The court does not doubt its power, however, to set aside a judgment and order a reargument at the same term, but this is only done when upon the record of the case one of the judges who concurred in the judgment has since seen cause to doubt its correctness.

In this case (the judgment on which is reported *ante*, p. 448,) *Mr. Reverdy Johnson*, on affidavits of new evidence, moved the court to open its judgment and remand it for further hearing in the court below.

*Mr. Black* opposed the motion.

\**Mr. Chief Justice TANEY* delivered the opinion of the [ \* 489 ] court.

The court cannot receive the depositions, nor hear an argument upon the motion. The point has already been decided at the present term in the case of *The United States v. Hensley*, and a similar motion overruled.

In the case of *Southard et al. v. Russell*, (12 How. 139,) the court held that it could not look beyond the record as transmitted from the inferior court, nor suffer its judgment to be influenced in any respect by new testimony offered here. And that case was before us in the exercise of the general chancery powers conferred by the constitution, in which a broad discretionary power may be exercised in order to promote the purposes of justice; for in a case prosecuted within that jurisdiction the defeated party, upon the discovery of new evidence, may, after a final decree in this court, obtain leave here to file a bill of review in the court below to review the judgment which this court had rendered. 16 How. 547.

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But the jurisdiction which the court exercises in this case is a special one, created by act of congress, and its mode of proceeding and powers are regulated and defined by the law; and it cannot, under any supposed analogy to proceedings in chancery, exercise any power beyond that which the act or acts of congress have given. 6 Pet. 470, *United States v. Nourse*. These acts of congress give this court the power to hear and determine the case upon the proceedings and evidence taken in the court below certified to this court; but no power to receive or consider any new evidence, although discovered since the decree was passed. Indeed, it would have been inconsistent with the policy upon which these acts of congress were passed to confer this power upon the court. This special jurisdiction was created in order to ascertain promptly the extent of the grants which had been made by the Mexican government to private individuals, and how much of the public domain still remained in the hands of the government at the time of the cession to the United States, and had become subject to the disposition of this government. And if a proceeding like the one now proposed was sanctioned, it would lead to interminable delays in almost every case where the decision was against the claimant, and it would be difficult to say when the rights of the United States could be regarded as finally settled in any case while a Mexican still made claim to the land under what he might allege to be a Mexican grant. And we may judge, from the character of the testimony offered in the cases which have already been before the court upon these Mexican claims, what would be the extent of the fraud and perjury to which such a privilege would lead, when the claimant had learned from the decision of the court what were the weak points of his case, and was strongly tempted by the magnitude of his claim to seek for and discover some new testimony to cure its defects.

We do not doubt the power of the court to open the judgment it has rendered at the present term, and continue or rehear the case, if, upon the record before us, any one of the judges who concurred in the decision had since seen cause to doubt its correctness. But in the absence of any such doubt the motion of the appellee is overruled.

Motion refused.

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Turner v. Flanigan.

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## ROBERT TURNER, Appellant, v. FLANIGAN and others.

1 Black, 491.

## ADMIRALTY.

1. In a libel for repairs, where the defense was that the libelants were joint owners of the vessel with respondent, his conduct in claiming and receiving all the proceeds of the sale of the vessel in another suit is conclusive as to his ownership. Other testimony concurs to the same effect.

APPEAL from the circuit court for the district of Maryland.

*Mr. Barrol*, for appellant.*Mr. Perrine*, for appellees.

\*Mr. Justice NELSON delivered the opinion of the court. [ \* 492 ]

This is an appeal from a decree in admiralty of the circuit court of the United States for the district of Maryland.

The libel was filed by the appellees against Turner, the appellant, *in personam*, for materials and repairs on the steamboat *Susquehannah*, in the port of Baltimore. It was filed 25th February, 1858.

The respondent set up, by way of plea, that he had previously filed a bill in equity against the libelants and others in the circuit court for Baltimore city, as joint owners and partners with him in the *Susquehannah*, for the purpose, among other things, of charging them with their proportionate share of the expenses of the repairs claimed; that the defendants in that bill had put in their answers, and that the suit was still pending. This plea was overruled; and the respondent answered the libel, setting up, substantially, the same matters as stated in the bill of complaint.

Further proceedings in the admiralty suit were suspended, by an order of the district judge, to await the result of the suit in equity in the Baltimore court, that suit having been first commenced, and jurisdiction of that court over the subject-matter having first attached.

A receiver was appointed in the equity suit, and, under an interlocutory order of the court, the vessel was sold and proceeds brought into the court, to abide the result of the litigation.

Subsequently Turner, the complainant, appeared in court and dismissed his bill in equity, and then claimed the fund in court, the proceeds on the sale of the *Susquehannah*, as belonging to him, he being the only person interested or entitled to it. There being no opposition to the application, as, indeed, there could not be,

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the defendants, in the bill in equity, in their answers, having not only denied any joint interest in the vessel, but insisted that the complainant was the owner, the application was granted, and the proceeds paid over.

After the bill in the Baltimore city court was dismissed, [ \* 493 ] the \*suit in the admiralty proceeded, and, on the 4th

January, 1859, a decree was rendered by the district court in favor of the libelants, for \$2,665.73, and interest, which, on appeal to the circuit court, was affirmed, with some modifications as to the amount.

The principal ground of the defense to the libel was, that the libelants were joint owners of the vessel with Turner, and hence the court had no jurisdiction of the case, either to settle the partnership accounts, or to adjust in any way the equities of the joint owners.

But the answer to this defense is, that the proofs in the case are full to show, that the libelants were not joint owners of the *Susquehannah*; but, on the contrary, that she was owned solely by the respondent. She was purchased by him from the Philadelphia, Wilmington, and Baltimore Railroad Company 7th November, 1856, and the conveyance taken in his own name. He afterwards attempted to sell the vessel to an association in Baltimore, of which the libelants, or a part of them, were members, but failed to complete the sale. The dismissal of the bill in equity, in which he attempted to charge these libelants, among others, for the expenses of the purchase and repairs of the *Susquehannah*, and receiving the proceeds of her sale, which were in court, upon the allegation that he was solely interested in the fund, go far to confirm the other proofs in the case, that the libelants had no interest in the vessel, as owners, at the time of the repairs; and, as is admitted, they were made at his request, that they were made on his credit.

The expenses of the repairs and of the materials furnished the vessel were satisfactorily proved, and, unembarrassed with the attempt to prove the joint ownership, the case is a very simple and plain one. That attempt having failed, the decree below was right, and should be affirmed.

Decree of the circuit court affirmed.

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Clifton v. Sheldon.

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## THE WATER WITCH.

CLIFTON, Appellant, v. SHELDON.

1 Black, 494.

ADMIRALTY—PRACTICE IN CIRCUIT COURT.

1. An appellant here cannot set up as a ground for reversing the decree of the circuit court that it was rendered for more than the appellee had recovered in the district court—there being no cross appeal—when the circuit court merely changed the form of the decree without changing its substance.
2. The vessel is liable for sea damage to cotton stored on deck, there being no evidence of an agreement by shippers that it might be so carried.
3. Whether this damage was caused by the fault of the master of the ship is a question of disputed testimony; and this court will not nicely criticise it after the findings of the circuit and the district courts—both in favor of appellee.

APPEAL from the circuit court for the southern district of New York, sitting in admiralty. The case is sufficiently stated in the opinion.

*Mr. Donohue*, for appellant.

*Mr. Owen*, for appellee.

\*Mr. Justice GRIER delivered the opinion of the court. [ \*498 ]

The decree in favor of the libelant \*in the circuit court [ \*499 ] was for a much larger sum than that rendered in the district court, and as there was no cross appeal by the libelant, the decree of the circuit court is now challenged as erroneous for that reason; but this apparent inconsistency will be found not to exist in reality, by a short reference to the history of the case, as exhibited by the record.

The libelant claimed as consignee of two hundred bales of cotton shipped on board the *Water Witch*, to be carried from Lavacca, in Texas, to New York. The libel charged that the cotton had been greatly injured by reason of bad stowage and want of care on the part of the master and crew of the vessel.

As an excuse for not tendering freight, the libel alleged that the damage to the cotton far exceeded the freight and primage. Another consignee filed his libel at the same time for that portion of the cotton consigned to him, with the same allegations, and the claimants of the ship filed their libel against the cotton for freight and primage. These three suits, all depending on the same facts, were tried as one.

The great question of the case was, whether the damage, which it

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The Water Witch.

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was admitted the cargo had received, was caused by the fault of the vessel, or before it was received on board—that is, whether it was sea damage, or country damage; and, if sea damage, whether the vessel was liable for it. The district court decided that the vessel was liable for the sea damage, and sent the cases to a master to report the amount of sea damage suffered by the cotton, and the sums severally due by the consignees for freight. Having these data by the report, that court, instead of entering a decree for each libellant for the sum found due to him, made a set-off of the freight due the ship against the amount of damage suffered by the cotton, giving a decree for each consignee for the balance, deducting freight, and dismissing the libel of the owners. The claimant of the ship appealed, in all the cases, to the circuit court. The several amounts found due by the master's report were adopted by that court, and the decree in each case corrected, so that the decree for the several consignees was for the whole damage, without set-off, and [ \* 500 ] a decree in favor of the ship for \*freight found to be due on the cotton, leaving the set-off to be made by the parties, or by order of the district court. The amendment made by the circuit court was in fact beneficial to the owners of the ship, as they recovered costs in their own suit. The court rightly decided "that the parties could not split up the claim for damages by applying a portion in extinguishing the freight money, and then ask a decree for the excess of this sum."

The appellants have, therefore, no reason to complain of the decree on this ground.

The amount of sea damage, as assessed in the report, was admitted to be correct. The refusal of the master of the ship to sign bills of lading could not affect the case. The ship having received the cargo, and carried it to the consignees in New York, and then libeled the cargo for freight, is estopped to deny her liability to deliver in like good order as received, with the usual exceptions.

It has been contended, that the language of the written contract between Mitchell and Forbes permitted the cargo to be carried on deck, and that the phrase "*capacity of the vessel*" admitted of such construction; but the fact that the owners of cargo refused to have such an agreement made a part of the bills of lading, and the agreement to pay under-deck freight, repel any such doubtful inference from the phrase. The evidence does not support the allegation of any agreement by the shippers, that the cotton, or any portion of it, should be carried on deck. The objection that Sheldon was not consignee, or if so, had no title to support the



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White's Administrator v. The United States.

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action, has no foundation in fact or in law. The claimants treated him as such, and as such he had made advances on the cargo.

Whether this sea damage was caused, as charged in the libel, by the fault of the master or the ship, was a question of fact, and encumbered, as usual, with a mass of conflicting testimony and opinions. The weight of the testimony, as decided by the judges of both courts, inclined in favor of the libellant, and we see no reason to differ from them. The weight of testimony is not always with numbers, and this court should not have their time spent in hearing arguments whether the eleven \*depo- [ \* 501 ] nents on one side ought to be believed rather than ten on the other. In such cases, the concurrent finding of two courts ought to satisfy the losing party.

The decree of the circuit court is affirmed, with costs.

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WHITE'S ADMINISTRATOR v. THE UNITED STATES.

1 Black, 501.

PETITION FOR MANDAMUS TO DISTRICT COURT OF CALIFORNIA.

The judgment of this court in this suit, as reported in 23 How. 249, (3 Miller, 522,) examined and explained as not authorizing the intervention of Miranda when the case was sent back. A *mandamus* to that effect refused by this court.

THIS was an application by Valentine and others, claiming under Miranda, for a *mandamus* to compel the judge of the district court of California to permit them to intervene for their interest in the suit sent back by this court, as reported in 23 How. 249, (3 Miller, 522.)

*Mr. Black* and *Mr. Green* for the relator.

*Mr. Cushing*, for White's administrator.

*Mr. Bates*, (attorney general,) for the United States.

\* Mr. Justice GRIER delivered the opinion of the court. [ \* 501 ]

The motion for a *mandamus* in this \*case is founded on [ \* 502 ] on a mistaken apprehension of the judgment of this court as it is reported in 23 Howard, 249.

Ortega had married the daughter of Miranda; they lived as one family, and entered into possession of the land claimed. Ortega's title purported to be founded on a petition to Governor Alvarado, dated 12th June, 1840; a reference report and marginal decree

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Ex Parte Gordon.

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signed by Alvarado, 10th of August, 1840, "which was returned to him to serve as a security during the other operations indicated." It was never completed by a final grant, and was not to be found among the archives, but its execution was proved by Alvarado himself. Miranda, in 1844, petitioned for a grant of the same land, alleging that he had been in possession of the land for more than four years. This *informé* was in the usual form, and is found among the archives. The court being divided in opinion as to the authenticity of the Ortega title, (and a majority expressing a doubt,) at first decided to send the record back to the district court, to have the conflicting claims of the father and son-in-law settled by a proceeding under the 13th section of the act of 1851. But our attention was afterwards drawn to the fact, that the proceeding, under the proviso in this section, was intended only for cases where both parties claimed under a confirmed Mexican grant by derivative titles, and as Ortega and Miranda claimed under several and distinct titles, the case did not come within the provisions of the 13th section. The court then reversed the decree of the district court, and not being fully satisfied on the evidence as to the genuineness of Ortega's papers, sent the case back for further examination. There was no order that a stranger to the record should be allowed to interplead and set up another grant, as a reason why the claimant's title should not be confirmed, for it appears from the opinion of the court that they objected to the proceeding because the Miranda grant had been used to combat that of Ortega in this proceeding. The first decree did not order the court below to allow the claimants under Miranda to interplead in this suit; and if it had done so, it was wholly annulled and set aside by the order and decree afterwards made on the 1st of May, 1860. It was [ \* 503 ] like a judgment in a common law \*case, where a judgment is reversed and a *venire de novo* ordered; and the reason given by the court was, "that the district court might not be trammelled in their future consideration of the case on all its merits."

The motion for a *mandamus* is therefore refused.

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EX PARTE GORDON.

1 Black, 503.

## PROHIBITION—JURISDICTION OF SUPREME COURT IN CRIMINAL CASES.

1. This court possesses no appellate jurisdiction over the judgments of the circuit courts in criminal cases, except where the judges of the court certify a division of opinion on some matter arising in the trial to this court.

## Ex Parte Gordon.

2. No party to a suit has a legal right to have any point so certified, and the judges would violate their duty to make such a certificate where no division of opinion existed.
3. This court has no power to issue a writ of prohibition in a case where it has no appellate jurisdiction over the court to which the writ must go, nor any special authority by statute. *Ex parte Christie*, 3 How. 292, reaffirmed.

THIS was a petition by Gordon, who had been sentenced to death for piracy in the slave trade, for a prohibition to the judges of the circuit court for the southern district of New York to prevent the execution of that sentence.

*Mr. Dean* presented the petition, and moved for an alternative writ of prohibition, and for a *certiorari*.

\* *Mr. Chief Justice TANEY* delivered the opinion of the [ \* 504 ] court.

Nathaniel Gordon has filed a petition to this court, stating that he has been indicted and convicted in the circuit court of the United States for the southern district of New York of the crime of piracy, under the act of congress prohibiting the African slave trade, and sentenced to death by the court, and a warrant issued and placed in the hands of the marshal of that district, commanding him to carry the sentence into execution on the seventh day of this month; that there were irregularities and errors in the proceedings against him, and that he had moved for an arrest of judgment in the circuit court, which motion had been overruled; and had also moved to have the case certified to this court as upon a division of opinion, in order that the proceedings against him might be revised here, but this application had also been refused; that the President of the United States has granted him a respite of the sentence until the twenty-first day of this month, and he fears that it will be carried into execution on that day unless it is prevented by the interposition of this court; and, upon this statement, he, by his counsel, moves for an alternative writ of prohibition directed to the circuit court and its officers; and also for a *certiorari*, returnable at the same time, directing the circuit court to return the papers, process, and proceedings in the case.

This motion cannot be sustained. It appears by the statement in the petition, that the party has been tried, and found guilty of the crime of piracy, and sentenced to be executed by a court of the United States, possessing competent jurisdiction, and from whose judgment no appeal is allowed, by law, to this tribunal; for, in criminal cases, the proceedings and judgment of the circuit court cannot be revised or controlled here, in any form of proceeding, either by writ of error or prohibition, and, consequently, we have no authority to examine them by a [ \* 505 ]

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Ex Parte Gordon.

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*certiorari*. And the only case in which this court is authorized even to express an opinion on the proceedings in a circuit court in a criminal case is, where the judges of the circuit court are opposed in opinion upon a question arising at the trial, and certify it to this court for its decision. But, certainly, the party had no right to ask for such a certificate, nor could it have been granted consistently with the duty of the court if the judges agreed in opinion, and did not think there was doubt enough to justify them in submitting the question to the judgment of this court.

But this motion asks the court to do even more than exercise an appellate power where none is given by law, for the case has now passed out of the hands of the court, and the warrant is in the hands of the marshal commanding him to execute the judgment of the court. The circuit court itself has not now the power to recall it, and, certainly, it would be without precedent in any judicial proceeding to prohibit a ministerial officer from performing a duty which the circuit court had a lawful right to command, and had by its process, regularly issued, commanded him to perform, and in a case, too, where no appellate power is given to this court to revise or control in any respect the judgment or proceedings of the circuit court. We are not aware of any case in which a similar motion has heretofore been made in this court in a criminal case. In a civil case, *Ex parte Christie*, (3 How. 292,) a motion was made for a prohibition to be issued to the district court of the United States for the district of Louisiana, to prohibit it from further proceedings in a certain case of bankruptcy then before it, upon the ground that it had transcended its jurisdiction in entertaining these proceedings. But this court was of opinion that it had not exceeded its jurisdiction, and the question as to its power to issue the writ was not necessarily involved in the decision of the case. In the conclusion of the opinion, however, after a very elaborate argument on the powers of the district court, under the bankrupt law, the court said, (page 322,) that although the question was not absolutely neces-

[ \* 506 ] sary to be decided, yet they deemed it \* proper to say, as the point had been fully argued, that this court possessed no revising powers over the decrees of the district court sitting in bankruptcy; that the district court had not interfered with, nor in any manner evaded or obstructed, the appellate authority of this court by its proceedings, and the court knew of no case where the court is authorized to issue a writ of prohibition to a district court, except in the cases expressly provided for by the 13th section of the judiciary act of 1789—that is to say, where the district courts are proceeding as courts of admiralty and maritime jurisdiction.

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The result of this opinion is, that a prohibition cannot issue from this court in cases where there is no appellate power given by law, nor any special authority to issue the writ. We concur in this opinion, and the rule applies with equal force to the case before us as it did in the case referred to.

Motion refused.

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FOSTER v. GODDARD—GODDARD v. FOSTER.

1 Black, 506.

EXCEPTION TO MASTER'S REPORT.

1. An exception to a master's report need not be as full and specific as a special demurrer. All that is required is that it shall distinctly point out the finding and conclusion of the master which it seeks to reverse.
2. This brings up all the questions of law and fact on that subject mentioned in the report.

THESE are cross appeals from decree of the circuit court for the district of Massachusetts. The court say in the opinion that the case turns exclusively on questions of fact, and involves but a single question of law which can be of interest in any other case. That point is given in the head notes.

*Mr. Bartlett* and *Mr. Schier*, for complainant.

*Mr. Goodrich*, for defendant.

\*Mr. Justice SWAYNE delivered the opinion of the court. [ \* 507 ]

These are cross appeals of the same cause in equity.

Foster is the complainant, and Goddard the respondent. The record is voluminous. The questions presented for our consideration are questions of fact. No legal question arises in the case, with the exception of a single point touching the form and effect of exceptions to a master's report. The case involves nothing else that can be of interest in any other case. We have considered it with all the care which the magnitude of the amounts involved, and the fullness of preparation and ability with which it has been presented, demand at our hands.

Upon some of the points pressed in the argument at bar, we have found difficulty in reaching conclusions satisfactory to ourselves, and such as we could all unite in. In the end, we have been able to do so.

We adopt the analysis of the case presented in the opening brief of the counsel of the complainants. It has the double merit of brevity and extreme clearness :

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"The bill alleges the execution by the parties of two several contracts, bearing date, respectively, June 24, 1843, and May 7, 1849.

"By the first of these complainant was to proceed to Valparaiso, remain there five years, and devote himself exclusively to the transaction of respondent's business, for which he was to receive, at the end of said five years, a portion of the net profits. By the second contract the complainant was to proceed to the west coast of South America, and devote his time to the management of respondent's business in those parts, and also in Mexico and California, for which he was to receive, on his return, a portion of the profits of the business, in the trade which complainant should have conducted to completion. This agreement also provided that complainant might terminate the contract at any time, by giving so much notice that any voyage respondent might have commenced previous to the receipt of such notice should receive the benefit of complainant's services to its final accomplishment. The prayer was that an account might be taken, and respondent decreed to pay complainant what was due.

"On the 3d of August, 1857, the respondent filed his answer, in which he admits the execution of said contracts, the rendition of the services by said Foster, and the possession of books of account, from which the amount, if any, due said Foster can be ascertained; alleges reasons for his delay in making up said accounts, and avers that the last-mentioned contract determined on 31st of December, 1850.

"On the 13th of August the complainant filed an amended bill, setting forth more particularly the mode in which the business was conducted, and the accounts kept and rendered to respondent, through the house of Alsop & Co.

"To this respondent filed an answer on the 4th of September, 1857. To this the general replication was filed, and the cause, by consent, was sent to a master to take an account, with special instructions. On the 8th May, 1858, the complainant, by leave of the court, withdrew his replication, and filed another amendment, alleging an agreement between the parties, that the second voyage of the ship *Crusader* should be taken and deemed within the said first agreement. To this the respondent filed an answer denying the allegation. The general replication was then filed, and the cause was then committed to the same master, with instructions similar to those formerly given.

"The master made his report June 2d, 1858, to which the respondent alleged ten exceptions.

"The cause came on for hearing before the circuit court, for the first circuit, at the October term, 1858. The learned judge, by his decree, sustained the first and tenth of the exceptions, and overruled the rest, and ordered the master's report to be reformed accordingly, which was done.

"From this decree the complainant and the respondent severally appealed."

We have considered all these exceptions with care. The argument at bar was confined chiefly to the first, second, third, \*and tenth. The complainant objects to the action of the [ \* 509 ] court touching the first and tenth, which were sustained. The defendant objects, because the second and third were overruled. In regard to the fourth, fifth, sixth, seventh, eighth, and ninth exceptions, it is sufficient to remark, that we see no reason to doubt the correctness of the master's findings to which they relate. In this we concur with the court below. They were not pressed by the defendant's counsel in the argument at bar. We deem it unnecessary to discuss the evidence, or the legal views by which the master's conclusions are sustained.

Before proceeding to consider the four remaining exceptions, we deem it proper to advert to an objection made to their form by the counsel for the complainant. It is said that such an exception is in the nature of a special demurrer, and that these are not so full and specific that the court can consider them.

Such is not the rule of this court. All that is necessary is, that the exception should distinctly point out the finding and conclusion of the master which it seeks to reverse. Having done so, it brings up for examination all questions of fact and of law arising upon the report of the master relative to that subject. The exceptions in this case are sufficiently full. They are in accordance with the experience of each member of the court in the administration of equity jurisprudence elsewhere.

We come now to the consideration of the exceptions which have been specially named.

"Second exception: For that the said master has erroneously charged this respondent with the sum of seventeen hundred and eighty-nine dollars and eighty-nine cents, the amount of a loss made in the prosecution of the business aforesaid, by a sale of goods to the New England Worsted Company, for which they have not paid, but refuse to pay."

The master's report, touching this subject, is as follows:

"The company were charged, on the books of Goddard, with the sum of \$2,173 04, on the balance of an account due for wool; but

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the amount due was in dispute between them. In 1850 [ \* 510 ] or 1851 the company tendered in payment about \*\$1,500, which Goddard declined to receive. Nothing further was done by either party until January, 1857, after the claim had been outlawed three years, when the company offered the sum of \$1,789 89, but Mr. Goddard refused to receive it, and also declined to permit Foster to receive his proportion of that sum.

"It is contended by the respondent that he had a right to conduct his own business in his own way, being responsible to Foster only for any want of good faith, and that he was neither bound to accept a sum less than what he believed to be due, nor to institute a suit to recover what he claimed; and that if any loss has thereby occurred, it is properly chargeable to the business.

"The management of the business, including the collection of the accounts, was under the absolute control of Goddard, and in conducting it he was responsible, I think, only for the exercise of good faith and ordinary diligence. He was not bound to accept the sum less than what he believed to be due; and if he had instituted a suit to recover the full amount, Foster would have undoubtedly been bound by the result. But was he at liberty to do neither? As between parties situated as were these, the authorized duty to collect being vested solely in one, and the amount of the compensation of the other depending, in a measure, upon the manner in which that duty should be performed, was it reasonable prudence or diligence for Mr. Goddard to decline either to receive what the debtor offered to pay, or to enforce the payment of what he himself claimed to be due? It is well settled, that if executors or trustees allow a debt against a solvent debtor to become outlawed, they are chargeable with the amount."

There is no complaint that the master has misapprehended the facts or stated them incorrectly. We are entirely satisfied with the views he has expressed and the conclusion at which he arrived.

"Third exception: For that the said master has allowed to the complainant, under the contract of June 24th, 1843, one-tenth of the profits made by this respondent in the construction and subsequent sale of a vessel commonly called the Valdivia, [ \* 511 ] \* which vessel was not employed in, nor put into, the business of this respondent, carried on under the contract aforesaid."

Upon this subject the master reported:

"This was a new ship, built by Mr. Ewell under a contract made by him with Mr. Goddard; was launched on the 15th of October, 1846, and was sold by Mr. Goddard to the United States govern-



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ment the 7th December, 1846, at a profit. The validity of this claim depends upon the construction to be given to the following clause in the agreement of 1843:

“And furthermore, said Goddard has the right of purchasing, selling, and chartering the vessels designed for the trade, at his option, the loss or profit attendant thereon to be charged or credited in the general account. It is also understood that said Foster’s interest of one-tenth is liable to the full extent for all the risks and casualties in the business, attendant upon the goods and vessels.

“This vessel was never actually employed in the business of this trade. On the other hand, there is evidence tending to prove that she was originally contracted for by Mr. Goddard, was built and was designed for this trade; that Mr. Goddard had engaged a part of her outward cargo; that these facts were communicated by him to Mr. Foster; and that, under instructions from him, Mr. Foster had procured a portion of her first return cargo. She was sold, (so far as the evidence shows,) however, before any cargo had been laden on board of her at Boston.

“March 17th, 1846, Goddard wrote to Foster: ‘I have contracted for a new ship of 550 tons, in the hopes of having one that will make her outward passage in sixty-five or seventy days; what shall be her name? I understand that Valdivia, the name of a province,’ &c.

“Again, August 22d, 1846: ‘Capt. Millet waits for the Valdivia, which will be despatched in November.’

“October 12th: ‘The Valdivia will be launched to-morrow, and will be our next ship. She will not, however, sail earlier than the 1st to the 15th December, it being impossible to obtain any cotton goods before that time, *although engaged some time since.*’

\* “October 13th, the next day: ‘Don’t sell anything [ \* 512 ] to arrive by the Valdivia.’

“January 5th: ‘Doubtless you will be surprised, perhaps disappointed, in seeing this vessel (the Santiago) instead of the new ship; but the truth is, I have been tempted to sell her to our government for some nine or ten thousand dollars above cost, cash in hand. She is now called the Supply.’

“It is contended by the respondent, that the complainant was only entitled to a share of the profits of such vessels as were actually employed in the trade, and not of those which might have been designed for the business, but not actually employed in it; that although Goddard may have intended the Valdivia for this trade, yet that he abandoned that intention before carrying it into effect,

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and that the agreement of 1843 did not restrict him from pursuing business on his private account.

"This agreement contemplated not only the *employment* necessarily of vessels carrying on this trade, but also as subservient to the main business, *the dealing* in vessels to a certain degree as subjects of trade; and this branch of the business was under the exclusive control of Goddard. It may be true that he was at liberty to pursue other business; but none the less for that reason was all that appertained to this agreement a distinct and independent business, and so to be preserved. Whatever act Goddard did, he did it with reference to one business or the other; either for the joint or for his private account. Whatever property was procured by him was procured *eo instanti* for one business or the other, and thereafter belonged to that business, and its character in this respect could not depend upon any subsequent purpose of Goddard, suggested by the results of the particular adventure. The proper effect, therefore, of the fact that Mr. Goddard was not restricted from other business is, that he was thereby bound still further, if possible, to preserve, with the most scrupulous exactness and good faith, the two businesses entirely distinct, marked and unconflicting, so that there should be neither temptation nor opportunity,

after having procured a vessel on one account, to subsequently change its destination, according as the \*adventure [ \*513 ] promised a profit or a loss. Whatever Goddard did under this agreement was at the common risk, and for the common benefit. If, in the honest exercise of his discretion, he had purchased a vessel for this trade, which proved immediately after the purchase wholly unfit for the business, and she was sold at a loss, can it be doubted that this loss would have been properly chargeable in the general account? On the other hand, if he had purchased, or by mutual consent had built a vessel for this trade, and the same had been sold at a profit before being employed, that profit, as it seems to me, equally belongs to the general account."

We have only to add, that if the *Valdivia* had been burned at any time before she was sold, we cannot doubt that Foster, under the circumstances, must have borne his share of the loss. He could not be liable if loss were to be borne, and excluded if profit were made.

The following is the first exception. It was sustained by the court:

- "First exception: For that the said master has not allowed to the said respondent, and has not permitted him to debit the business of this respondent, carried on by him under the contract dated

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June 24, 1843, sundry sums of money paid by the said respondent in the regular and usual course of his said business for clerk-hire, taxes, and advertising, to wit: thirty-eight hundred and thirty-eight dollars and seventy-eight cents for clerk-hire, seventeen hundred and eleven dollars and ninety cents for taxes assessed upon the property employed in said business, and three hundred dollars paid for advertising his said business; the said sums amounting in the aggregate to fifty-eight hundred and fifty dollars and sixty-eight cents, all which were proper expenditures in the course of the said business."

The solution of the question presented by this exception must depend upon the construction given to the following clause of the first agreement between the parties:

"In consideration of which said Goddard engages that said Foster shall, at the expiration of five years, be entitled to one-tenth of the net profits of his business in that trade, after deducting \*interest, at the rate of six per cent. per annum, on the [\* 514] capital invested; and all costs and expenses of whatever name and nature that may be incurred, both at home and abroad, in sailing, victualling, manning, keeping in repair the vessels employed, including all port charges, as also the actual expenses that may appertain to the goods themselves, including the cost of said Foster's living, which is not to exceed six hundred dollars per annum."

If the charges for taxes, clerk-hire, and advertising claimed are allowed, it must be under the terms, "the actual expenses that may appertain to the goods themselves." We are all of opinion that those terms are comprehensive enough to include these items. It was certainly not the intention of the parties that the defendant should make a donation by any expenditure in the business. The computation should be made as if he were engaged in no other business. The items in question are as much a part of "the actual expenses," appertaining "to the goods themselves," as storage, commission, or insurance. They rest on the same foundation, and the same language in the contract which affords a warrant for including the latter applies with equal force to the former.

"Tenth exception: For that the said master has allowed the complainant one-fourth of the profits made by this respondent in the use and employment of a vessel called the Harriet Erving, and its cargoes, during her third voyage, which was not sought to be recovered by the complainant in his original or amended bill, which vessel and cargoes, and the profits resulting therefrom during the said voyage, were not embraced in the contract of May 7th, 1849,

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nor by any contract or agreement made by the respondent with the complainant, but were solely and exclusively at the profit and loss of the respondent."

The provisions of the contract of 1849, to be considered in connection with this exception, are as follows :

"That said Foster engages to proceed at once to the west coast of South America, and that he will devote his whole time in those parts, as also in Mexico and California, exclusively to the management of all said Goddard's business in those countries, such [ \* 515 ] as the sale and purchase of merchandise, and any \*other property, collecting freight moneys, procuring freight and consignments of goods, eliciting orders for the purchase and shipment of property, investing money, drawing and negotiating bills of exchange, and forwarding all the information that can be obtained respecting the trade; in fine, to transact any and all business that may be required of him by said Goddard, in accordance with his instructions and best interests, which he is also to care for, and protect from impositions, unjust charges, and also extravagant expenditures of the shipmasters, to the best of his ability.

"In consideration for which, said Goddard engages that said Foster shall, on his return, be entitled to one-fourth part of the net profits of his business in that trade that he (said Foster) shall have conducted to completion, after deducting, &c.

"It is understood that said Foster is to leave in the hands of said Goddard, bearing interest, what funds he may have—less two thousand dollars, to be paid him before leaving this country—and that neither the same nor any portion of his profits shall be abstracted, until he shall see fit to withdraw from the present arrangement, which he is at liberty to do at any time, by giving said Goddard so much notice that any voyage he may have commenced previous to receipt of such advice shall receive the full benefit of all said Foster's services to its final accomplishment, and not otherwise. It is also understood that said Goddard has the right to annul this agreement whenever he may choose to do so; and furthermore, that said Foster is liable to the full extent of his interest and means for all the losses that may be made in this business, as also for all the risks and casualties attendant thereon."

It is not material to inquire whether this agreement made the parties copartners. It provided a definite mode of terminating the agreement by Foster. Pursuant to that provision, Foster, on the 22d of February, 1850, addressed a letter to Goddard, giving him notice that he proposed to join the house of Alsop & Co., of Valparaiso, on the 1st of January following, and on the day preceding

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to terminate the agreement between Goddard and himself. In that letter he said :

\* \* \* "After our long and satisfactory connection \* together, I must say that I leave it with many regrets ; [ \* 516 ] and I doubt not but the feeling is mutual. The truth is, however, that the connection, to a certain extent, will still exist. But, by the articles of this house, no active partner can have any interest out of the establishment, and they are bound down in the most particular manner."

The letter, it seems, was received by Goddard about the 1st of April, 1850. On the 13th of that month he replied in a letter to Foster, "I am very glad to learn your decision to join the house, it being what I would have advised for your own interest."

In Foster's reply of the 29th of May, 1850, he says :

\* \* \* "I did not expect you would be able to say whether you intended sending Mr. Erving immediately or not. Be that as it may, you may rely with safety upon my exertions and interest in your favor as much as ever, and also as if you had an agent upon the spot."

On the 1st of January, 1851, Foster, according to the notice given by his letter of the 22d of February, 1850, entered the house of Alsop & Co. From that time new relations subsisted between him and Goddard. He ceased to be bound or able to "devote his whole time in those parts, as also in Mexico and California, exclusively to the management of said Goddard's business in those countries, such as," &c., (see contract.)

*All the requirements* of the contract as to Foster's services were the consideration of Goddard's agreement as to Foster's compensation. After the 1st of January, 1851, Foster could not, as an honest man, without the consent of Alsop & Co., (which is not shown,) have "any interest out of the establishment." According to the notice given by Foster, and accepted by Goddard, the contract between them was to terminate on the 31st of December, 1850. The complainant's bill avers that it did then terminate.

"And your orator further sheweth that the said copartnership business was forthwith entered upon and conducted by your said orator and the said Goddard until the thirty-first day of December, A. D. one thousand eight hundred and fifty, when the said agreement was terminated by the said orator's \* giving due [ \* 517 ] notice to the said Goddard in the manner provided for in and by said agreement."

The Harriet Erving sailed from Boston for Valparaiso upon the voyage in question on the 21st of August, 1850, more than four

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months after Goddard received Foster's notice. She arrived at Valparaiso on the 8th of December, 1850; sailed for Coquimbo on the 27th of the same month; for Talcahuano on the 4th of January, 1851; and in the same month for Boston, where she arrived on the 7th of April, 1851. The new agent of Goddard arrived at Valparaiso about the 1st of November, 1851. The selling of the Harriet Erving's outward cargo commenced soon after her arrival at Valparaiso, and was continued down to June, 1853. The entire amount of the net proceeds was \$205,620 74. All the sales were made by Alsop & Co., who received commissions amounting in the aggregate to \$9,736 26. Nearly one-half of the cargo in value was sold before Foster entered the house of Alsop & Co. Upon that part which was sold after that time, he was entitled to a share of the commissions, as a member of that firm. Before Foster entered the house, all sales, in the course of the business, had in form been made by Alsop & Co., who received a commission for both selling and guaranteeing. The homeward cargo of the Harriet Erving had all been provided by Foster before her arrival at Valparaiso. Numerous letters from Goddard to Foster are produced, containing isolated expressions, which seem to imply that he regarded Foster as having an interest of some sort in this voyage of the vessel.

After a careful examination of this part of the case, we are brought to the following conclusions:

1. That the agreement of May 7, 1849, was wholly put an end to on the 31st day of December, 1850, by the parties, in the manner therein provided.

2. Its termination at that time was not waived by either of the parties.

3. If it were not terminated at that time we should be compelled, under the circumstances, to regard the averment of the bill upon that subject as conclusive.

[\* 518] \*In equity proceedings the proofs and allegations must agree. A party can no more succeed upon a case proved, but not alleged, than upon a case alleged, but not proved. 9 Cranch, 19, *Simms v. Guthrie, et al.*; 9 Pet., 483, *Harrison v. Nixon*; 10 id., 178, *Boone v. Chiles*; 3 Barb's C. R., 613, *Trip v. Vincent et al.*; 3 Ohio R., 61, *Bank United States v. Shultz*; 5 Dana, 552, *Sadler v. Grover*; 1 J. J. Marsh, 237, *Breckenridge v. Ormsby*.

4. That the complainant not having "conducted to completion," within the life of the contract, "the business in that trade" growing out of this voyage of the Harriet Erving, that branch of the case is not within the contract of May 7th, 1849, and hence not before us.

*Hoyt v. Thompson's Executors.*

It follows, in our judgment, that the court decided correctly in sustaining this exception.

It may be that the complainant has a valid claim to be paid for his services under an implied contract upon the principle of *quantum meruit*. But as that is an inquiry outside of the case as now before us, it is neither necessary nor proper that we should express any opinion upon the subject.

The decree of the circuit court must be affirmed, with costs.

JESSE HOYT, Plaintiff in Error, *v.* THOMPSON'S EXECUTORS, and others.

1 Black, 518.

## JURISDICTION OVER STATE COURTS.

1. In order to give jurisdiction to this court on a writ of error to a State court, it must appear by the record that the point on which it relies was made in the State court, and that the section of the constitution and the right claimed under it was brought to the notice of the State court.
2. It is not sufficient that it appears to the court here now that such a point might have been raised, if its decision rested on other grounds, and this was not called to their notice.

WRIT of error to the superior court of the city of New York. The point on which the case turned is sufficiently stated in the opinion.

*Mr. Hoyt*, for plaintiff.

*Mr. Blatchford*, *Mr. Stoughton*, and *Mr. De Forrest*, for defendants.

\*Mr. Chief Justice TANEY delivered the opinion of the [\*520] court.

This being a writ of error directed to a State court, it is incumbent upon the plaintiff, in order to give jurisdiction to this court, to show that one of the \*questions enumerated [\*521] in the twenty-fifth section of the act of congress of 1789, Ch. 20, arose at the trial, and that a right he claimed under the constitution of the United States, or an act of congress, was decided against him.

In the argument here, he alleges that the construction and effect of the first section of the fourth article of the constitution was drawn in question, and the right to the property in dispute, which he claimed under it, was decided against him.

The section referred to is in the following words:

"Full faith and credit shall be given in each State to the public

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Hoyt v. Thompson's Executors.

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acts, records, and judicial proceeding of every other State. And the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

And he now contends that, by virtue of the act of the legislature of New Jersey, and the proceedings and decree of the court of chancery of that State, and the sale by the receivers under the authority of that court, as set forth in the bill of complaint, the right to the property in controversy vested in the vendees, under whom he claims title; and that the State court by deciding against him, refused to give full faith and credit to the records and judicial proceedings in New Jersey, as required by the clause in the constitution above quoted.

But, in order to give this court the power to revise the judgment of the State court on that ground, it must appear upon the transcript, filed by the plaintiff in error, that the point on which he relies was made in the New York court, and decided against him; and that this section of the constitution was brought to the notice of the State court, and the right which he now claims here claimed under it. The rule upon this subject is clearly and fully stated in 18 How. 515, *Maxwell v. Newbold* and others, as well as in many other cases to which it is unnecessary to refer.

This provision of the constitution is not referred to in the plaintiff's bill of complaint in the State court, nor in any of the proceedings there had. It is true, he sets out the act of the legislature of

New Jersey, the proceedings and decree of the chancery [ \* 522 ] court of that State under it, and the sale of the property \* in dispute by the authority of the court, which, he alleges, transferred the title to the vendee, under whom he claims, and charges that the assignment set up by the defendants was fraudulent and void, for the reasons stated in his bill. But all of the matters put in issue by the bill and answers, and decided by the State court, were questions which depended for their decision upon principles of law and equity, as recognized and administered in the State of New York, and without reference to the construction or effect of any provision in the constitution, or any act of congress. This court has no appellate power over the judgment of a State court pronounced in such a controversy, and this writ of error must, therefore, be dismissed for want of jurisdiction.



Meyer v. Meyer.

## THE STEAMER ST. LAWRENCE.

MEYER and WILCOX, Appellants, v. MEYER and STUCKEN.

1 Black, 522.

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## ADMIRALTY JURISDICTION—HOME PORT—RULES OF 1844 AND 1858.

1. The twelfth rule of admiralty practice, presented by the supreme court in 1844, authorized a proceeding *in rem* where the State law gave a lien for supplies and repairs in a domestic port, but this rule was altered, and process *in rem* denied, unless the lien was given by maritime law as an alteration of the rule which took effect May 1, 1859.
2. These rules refer exclusively to the character of the process to be used in certain cases, and this change has no relation to the question of the jurisdiction of the court.
3. While the decisions of this court show the difficulty which has been experienced in fixing the boundaries of the jurisdiction in admiralty and maritime cases—a difficulty increased by the complex nature of our federal and State jurisprudence—it is certain that no State can enlarge it, nor can an act of congress or a rule of this court make it broader than the judicial power may determine to be its true limits.
4. But congress may prescribe the forms and modes of proceeding in the tribunals which it establishes, and may authorize the court to proceed by attachment against property, or by arrest of the person, as it may think best.
5. The acts of congress and the decisions of this court examined, and the power of this court to frame rules held to extend to the modes of proceeding and to the process to be used, but not to the subject-matter of the jurisdiction.
6. The reasons for the change of the rule given and considered, to wit: the embarrassment arising in the federal courts from the varying and conflicting State laws, and the conflict of rights arising under them.
7. In this case, as the State law gave a lien, and the rule of the court which authorized process *in rem* to enforce it was at that time in operation, the right to this process was not lost by the subsequent modification of the rule.
8. The lien thus acquired was not waived by the acceptance of the owner's notes by any rule of maritime law, unless it is shown that the libelants agreed to receive them in lieu of their original claim.
9. A purchaser of the vessel, under such circumstances, though he had no notice of the lien, does not take her discharged of it on his hands.

APPEAL from the circuit court for the southern district of New York. The case is fully stated in the opinion.

*Mr. Lane*, for appellants.

*Mr. Williams*, for appellees.

\* Mr. Chief Justice TANEY delivered the opinion of the [\* 525] court.

This is an appeal from the decree of the circuit court for the southern district of New York, sitting as a court of admiralty.

The case as presented by the transcript is this: The appellees, in the summer and fall of 1855, were requested by John Graham, the owner of the steamer St. Lawrence, who resided in New York, to

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acts, records, and judicial proceeding of every other State. And the congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

And he now contends that, by virtue of the act of the legislature of New Jersey, and the proceedings and decree of the court of chancery of that State, and the sale by the receivers under the authority of that court, as set forth in the bill of complaint, the right to the property in controversy vested in the vendees, under whom he claims title; and that the State court by deciding against him, refused to give full faith and credit to the records and judicial proceedings in New Jersey, as required by the clause in the constitution above quoted.

But, in order to give this court the power to revise the judgment of the State court on that ground, it must appear upon the transcript, filed by the plaintiff in error, that the point on which he relies was made in the New York court, and decided against him; and that this section of the constitution was brought to the notice of the State court, and the right which he now claims here claimed under it. The rule upon this subject is clearly and fully stated in 18 How. 515, *Maxwell v. Newbold* and others, as well as in many other cases to which it is unnecessary to refer.

This provision of the constitution is not referred to in the plaintiff's bill of complaint in the State court, nor in any of the proceedings there had. It is true, he sets out the act of the legislature of New Jersey, the proceedings and decree of the chancery [ \* 522 ] court of that State under it, and the sale of the property \*in dispute by the authority of the court, which, he alleges, transferred the title to the vendee, under whom he claims, and charges that the assignment set up by the defendants was fraudulent and void, for the reasons stated in his bill. But all of the matters put in issue by the bill and answers, and decided by the State court, were questions which depended for their decision upon principles of law and equity, as recognized and administered in the State of New York, and without reference to the construction or effect of any provision in the constitution, or any act of congress. This court has no appellate power over the judgment of a State court pronounced in such a controversy, and this writ of error must, therefore, be dismissed for want of jurisdiction.

Meyer v. Meyer.

## THE STEAMER ST. LAWRENCE.

MEYER and WILCOX, Appellants, v. MEYER and STUCKEN.

1 Black, 522.

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The case as presented by the transcript is this: The appellees, in the summer and fall of 1855, were requested by John Graham, the owner of the steamer St. Lawrence, who resided in New York, to

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The Steamer St. Lawrence.

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make sundry repairs to the vessel, and to furnish materials for that purpose. The steamboat was then lying in the harbor of New York, which was her home port. The libel states that at the time these repairs were made and materials found, the laws of New York gave them a lien for the amount on the vessel; and they pray that the steamer may be condemned and sold to satisfy their claim. The application for process against the vessel was founded upon the 12th rule of admiralty practice, prescribed by this court in 1844, (3 How.,) which authorized this mode of proceeding, where the local law gave a lien upon the vessel for supplies or repairs in a domestic port. This rule was altered at December term, 1858, and process *in rem* denied to the party unless a lien was given by the maritime law. The alteration took effect on the 1st of May, 1859, (21 How.,) and the libel in this case was filed while the former rule was still in force.

There is no question as to the amount due, the proctor for the claimants having assented to the report of the commissioners. But the claimants allege in their answer, that these materials were furnished and repairs made upon the personal credit of Graham, and that the libelants accounted with him, and took his notes for the amount after the work was done. They allege further, that they afterwards purchased the vessel from Graham in good faith, and without notice of this claim; and insist, that as the lien claimed is not created by the maritime law, but solely by a statute [ \* 526 ] of New York, it cannot be \*enforced in a court of admiralty, because a statute of a State cannot enlarge the jurisdiction of a court of the United States.

With reference to the last-mentioned objection, it may be proper to notice it, more particularly as it is founded upon a misconception of the object and effect of the rules above mentioned.

The objection is founded upon the assumption, that these rules involve a question as to the extent of the admiralty jurisdiction granted by the constitution. And as the court could not, consistently with its duty, refuse to exercise a power with which it was clothed by the constitution and laws, the appellants insist that the alteration made by the rule in 1858 must be regarded as an admission that the court had fallen into error when it adopted the rule of 1844, and had exercised a jurisdiction beyond its legitimate boundary; and if the admiralty court had not the right to enforce a State lien in a case of this kind, the rule then in force could not enlarge its jurisdiction, nor authorize the decree of the circuit court which supported and enforced this lien.

The argument would be unanswerable, if the alteration related

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to jurisdiction ; for the court could not, consistently with its duty, refuse to exercise a power which the constitution and law had clothed it, when its aid was invoked by a party who was entitled to demand it as a matter of right.

But there is a wide difference between the power of the court upon a question of jurisdiction and its authority over its mode of proceeding and process. And the alteration in the rules applies altogether to the character of the process to be used in certain cases, and has no relation to the question of jurisdiction.

Judicial power, in all cases of admiralty and maritime jurisdiction, is delegated by the constitution to the federal government in general terms, and courts of this character had then been established in all commercial and maritime nations, differing, however, materially in different countries in the powers and duties confided to them; the extent of the jurisdiction conferred depending very much upon the character of the government in which they were created; and this circumstance, \*with the general terms of [ \* 527 ] the grant, rendered it difficult to define the exact limits of its power in the United States.

This difficulty was increased by the complex character of our government, where separate and distinct specified powers of sovereignty are exercised by the United States and a State independently of each other within the same territorial limits. And the reports of the decisions of this court will show that the subject has often been before it, and carefully considered, without being able to fix with precision its definite boundaries; but certainly no State law can enlarge it, nor can an act of congress or rule of court make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just construction of the words used in the constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the federal government.

Yet congress may undoubtedly prescribe the forms and mode of proceeding in the judicial tribunals it establishes to carry this power into execution ; and may authorize the court to proceed by an attachment against the property, or by the arrest of the person, as the legislature shall deem most expedient to promote the purposes of justice.

A brief history of the legislation of congress upon this subject will explain the grounds upon which the rule of 1844 was adopted, and also the reason that induced the court to change it; and will also show that no question of jurisdiction was supposed to be in-

volved in the adoption of the original rule, nor in the change that was afterwards made.

After the passage of the judiciary act of 1789, congress, at the same session, passed the act prescribing the process to be used in the different courts it had just established, (1 Stat. 93;) and by that act directed that, in the courts of admiralty and maritime jurisdiction, the forms and modes of proceeding should be according to the course of the civil law.

This act left no discretionary power in the admiralty courts, or in the supreme court, in relation to the modes and forms of proceeding. And it is evident, that if the courts of admiralty [ \* 528 ] in this country used the process *in rem*, or process by \*attachment of the property, in all cases in which it was authorized in countries governed by the civil law, it would unavoidably in some cases come in collision with the common-law courts of the State where the parties resided, and where the property was situated, and where other parties besides the owners or builders, or equippers of the ship, might have an interest in, or a claim upon, the property, which they had a right to assert in the courts of the State.

But this difficulty was soon seen and removed. And by the act of May 8, 1792, (1 Stat. 275,) these forms and modes of proceeding are to be according to the principles, rules, and usages which belong to courts of admiralty, as contradistinguished from courts of common law. And these forms and modes of proceeding are made subject to such alterations and additions as the respective courts might deem expedient, "or to such regulations as the supreme court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same." And the power here conferred upon this court was afterwards enlarged by the act of August 23, 1842.

It was under the authority of these two acts that the rule of which we are now speaking was made in 1844; and afterwards, by virtue of the same authority, altered by the rule adopted at December term, 1858.

It was manifestly proper, and perhaps necessary, that this power should be confided to the court; for, it being the province of this court to determine what cases came within the admiralty and maritime jurisdiction of the United States, its process and mode of proceeding in such cases should be so framed as to avoid collision with the State authorities, where rights of property were involved, over which the State had a right to legislate, without trespassing upon the authority of the general government. The

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power was, therefore, given to the court, not only to make rules upon this subject, but to make them from time to time, so that, if any new difficulty should arise, it might be promptly obviated, and the modes of proceeding and the process of the admiralty courts so moulded as to accomplish that object.

\* The case of *The General Smith* (4 Wheat. 438) was [\* 529] decided upon these principles, and the right to proceed against the property regarded as a mere question of process and not of jurisdiction. And the court held that where, upon the principles of the maritime code, the supplies are presumed to be furnished on the credit of the vessel, or where a lien is given by the local law, the party is entitled to proceed *in rem* in the admiralty court to enforce it; but where the supplies are presumed by the maritime code to be furnished on the personal credit of the owner or master, and the local law gives him no lien, although the contract is maritime, yet he must seek his remedy against the person, and not against the vessel. In either case, the contract is equally within the jurisdiction of a court of admiralty. And it is obvious, from this decision, that the court considered the process *in rem* or priority given for repairs or supplies to a domestic vessel by the courts of admiralty, in those countries where the principles of the civil law have been adopted, as forming no part of the general maritime code, but as local laws, and therefore furnishing no precedent for similar cases where the local law is otherwise; consequently they form no part of the admiralty and maritime jurisdiction conferred on the government of the United States. This case was decided in 1819, and has always since been followed and regarded as a leading one in the admiralty courts. Its authority was recognized in the cases of *Peyroux v. Howard*, (7 Pet. 324;) and *The New Orleans v. Phœbus*, (11 Pet. 275,) and in others to which it is unnecessary to refer. And while process against the vessel was denied in the case of *The General Smith*, because the law of Maryland gave no lien or priority, it was used and supported in the case of *Peyroux v. Howard*—a similar case—upon the ground, that the party had a lien on the vessel by the law of Louisiana, and as the contract was within its jurisdiction, it ought to give him all the rights he had acquired under it; yet, certainly, the court never supposed that the admiralty jurisdiction was broader in Louisiana than in Maryland.

When this court framed the rules in 1844, it, of course, \*adhered to the practice adopted in the previous cases, and [\* 530] by the 12th rule authorized the process *in rem* where the party was entitled to a lien under the local or State law. But in the rules then adopted, this rule as well as the others are explicitly

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adopted as "a rule of practice," and, consequently, liable to be altered from time to time, whenever it was found to be inconvenient, or likely to embarrass the legitimate business of the court. And there could be no embarrassing difficulties in using the ordinary process *in rem*, of the civil law, if the State law gave the lien in general terms, without specific conditions or limitations inconsistent with the rules and principles which governed implied maritime liens; and whenever this was the case, the process to enforce it promoted the convenience and facilities of trade and navigation by the promptness of its proceedings. It disposed at once of the whole controversy, without subjecting the party to the costs and delay of a proceeding in the chancery or common-law courts of the State, to obtain the benefit of his lien, if he failed to obtain satisfaction in his suit against the person in the court of admiralty.

The State lien, however, was enforced, not as a right which the court was bound to carry into execution upon the application of the party, but as a discretionary power, which the court might lawfully exercise for the purpose of justice, where it did not involve controversies beyond the limits of admiralty jurisdiction. In many of the States, however, the laws were found not to harmonize with the principles and rules of the maritime code. Certain conditions and forms of proceeding are usually required to obtain the lien, and it is generally declared forfeited or regarded as waived after the lapse of a certain time, or upon some future contingency. These conditions and limitations differ in different States, and if the process *in rem* is used wherever the local law gives the lien, it will subject the admiralty court to the necessity of examining and expounding the varying lien laws of every State, and of carrying them into execution, and that, too, in controversies where the existence of the lien

is denied, and the right depends altogether on a disputed [ \*531 ] construction of a State statute, or, indeed, in some \*cases of conflicting claims under statutes of different States, when the vessel has formerly belonged to the port of another State, and becomes subject to a lien there by the State law.

Such duties and powers are appropriate to the courts of the State which created the lien, and are entirely alien to the purposes for which the admiralty power was created, and form no part of the code of laws which it was established to administer.

Moreover, cases may, and, indeed, have arisen, where a third party claimed a lien prior and superior to that of the libellant under the provisions of a State statute. And where such a controversy arises in a proceeding *in rem*, the admiralty court clearly has not power to decide it, and adjust the priorities in dispute, and would



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be compelled to abandon and recall its process whenever the controversy assumed that shape.

The proceeding, therefore, *in rem*, upon the ground that the local law gave the lien, where none was given by the maritime code, was found upon experience to be inapplicable to our mixed form of government. It was found to be inconvenient in most cases, and absolutely impracticable in others, and the rule which sanctioned it was therefore repealed. And the repealing rule provided, that the new rule should not go into operation until the day named in it, because it would have been unjust to those who had already proceeded under the rule of 1844, or might institute proceedings under it before they were aware of the alteration, to subject them to costs and delay by a sudden and unexpected change of a rule of practice.

The case before us was commenced before the change in the rule; and, as there was an undoubted lien acquired under the State law, we think the court had a right to enforce it upon the principles above stated, since no provision of the New York statute, as far as it affected the case, was inconsistent with a maritime lien; and the execution of the process involved no inquiries beyond the legitimate authority of the court.

The remaining question is, has this lien been forfeited or waived? It does not appear to have been forfeited or waived \*under any provision in the New York statute, nor was it [\* 532] waived upon the principles of maritime law by the acceptance of Graham's notes, unless the claimants can show that the libelants agreed to receive them in lieu of and in place of their original claim. The notes, in this instance, have been surrendered, and were filed in the proceedings in the district court. And the language of the court in the case of *Ramsey v. Allegre*, (12 Wheat. 611,) and of Judge Story in commenting upon that case in 3d How. 573, necessarily imply that if the notes had been surrendered, the party would have a right to stand upon his original contract, and to seek his remedy in the forum to which it originally belonged, as fully as if the notes had never been given.

In this case the proof is positive, by the testimony of a witness who was present at the time the notes were given, that it was understood by the parties that they were not to discharge or affect his lien, and that the vessel was to continue liable for his claim as before. And although the respondents appear to have purchased without notice of this incumbrance, their want of caution in this respect cannot deprive the libelants of a legal right, which they have done nothing to forfeit.

The decree of the circuit court is therefore affirmed, with costs.

## GEORGE LAW, Plaintiff in Error, v. ALEXANDER CROSS.

1 Black, 533.

## PRINCIPAL AND AGENT.—PRACTICE IN CIRCUIT COURT.

1. A member of a mercantile firm may make a contract for his individual services with a third person in whom his partnership has no interest; and his conducting the correspondence through the partnership, and even his agreement to give his partners an interest in that particular business, does not prevent him from sustaining an action in his own name for the services rendered under the contract.
2. The court is not bound to give or refuse every one of a long series of instructions for the jury prayed for by a party. If it appear that the law was sufficiently explained to the jury, and the law as given was sound, there is no error on which it can be reversed for refusing instructions asked.
3. Where the agent had exceeded his authority, but with good motives, in purchasing coal for a vessel at a place not authorized by his instructions, it was properly left to the jury to say, under all the circumstances, whether the acquiescence of the principal ratified his acts.

THIS was writ of error to the circuit court for the southern district of New York.

*Mr. S. D. Law* and *Mr. Gillet*, for plaintiff.

*Mr. Lane*, for defendant.

[ \* 536 ] \* Mr. Justice GRIER delivered the opinion of the court.

The objection that this suit should have been brought in the name of Cross, Hobson & Company, instead of Alexander Cross, has no support either in law or the facts in evidence. The contract on which the suit was brought was with Cross alone. Law had established a line of steamers on the Pacific, to run from Panama to San Francisco. It became necessary to supply [ \* 537 ] them with coal at Valparaiso, \* and to have purchases of it made there, in expectation of their arrival round the cape, and for supplies at San Francisco.

Cross being in New York in January, 1850, and about to go to Valparaiso, was employed by Law to make purchases of coal for him at Valparaiso. His letters of instruction are all directed to Cross alone, and contain no intimation of any other party in the transaction. Cross was a member of the mercantile firm of Cross, Hobson & Co., doing business in Valparaiso. The same firm had a house also in San Francisco. Through these houses much of the correspondence necessary in the transaction of the business was carried on. That Cross was a member of each of these firms, was but an accident in the case, and would not necessarily make them par-

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ties to the contract more than if any other individual or firm had been his agents; and even if Cross had agreed to make them equal shares in the profits arising from the contract, they did not thereby become parties to it. The firm had no contract with Law on which they could sustain a suit, or be liable to him. Much stress was made in the argument of this case, that the firm, in their correspondence with Law, giving information of what had been done, used the words "*we*" and "*us*." There was certainly no grammatical impropriety in the use of these pronouns; but the inference that the firm were not acting for Mr. Cross, and that Law had made some contract with them which does not otherwise appear, is certainly not a necessary one either in law or in fact. Every letter of instruction as to purchase of coal was sent by Law to Cross individually. His letter of instruction also to the master of the Antelope directs a consignment of the vessel to Cross, and not to the firm. The letters of credit were to Cross alone, on the faith of which he alone could draw bills to make the necessary payments.

A congeries of instructions, so called, amounting to the number of twenty-eight, were requested. The court, without confusing the jury with a special answer to each one of these propositions, properly submitted the facts to the jury, and gave them instructions as to the law. A large number of \* these points, [ \* 538 ] which involve questions of law, were ruled in the charge as requested by the counsel.

The case was argued here, in some measure, as if it had been an appeal in admiralty, or motion for a new trial.

To comment on all the objections attempted to be raised in the case would be tedious and unprofitable. It will be sufficient to notice the real questions in the case, and the instructions given by the court. If these were correct, the court below were not bound to answer specifically each question in the catechism, nor this court to comment thereon.

I. As to the cargo of the *Duncan*, it was objected that there was no authority to the agent to make such purchase.

The defendant had, by his letter of May 28, 1850, instructed the plaintiff as follows:

"I want you to purchase me two cargoes of coal afloat, and send it to San Francisco as soon as possible; consign it to your house there for me," &c. This cargo was purchased on its way to Valparaiso, with an option to refuse it if it should not arrive in sixty days. The coal afterwards arrived, but the master of the vessel refused to take it to San Francisco, and another vessel was chartered to take it. There was some dispute as to what was meant by the

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term "*afloat*," and testimony was given as to its meaning among merchants.

The court submitted the question to the jury.

We can discover no error in this instruction.

II. As to the coal purchased at Coquimbo, and afterwards sent to San Francisco by the *Amelia*, Law had instructed Cross to buy 350 tons of coal at Valparaiso for the *Antelope*, which was expected to arrive at Valparaiso by the first of June; but she did not arrive till 28th of August, in consequence of delay in starting and detention on the way. In July Cross wrote to Law that he had purchased the coal for the *Antelope*, not at Valparaiso, but at Coquimbo, stating as a reason that coal was scarce and difficult to procure, and he was fearful the vessel might arrive and not find a supply, and Coquimbo was but a day's sail further on the way, the coal cheaper, and a safer and easier place to ship it. But when the [ \* 539 ] *Antelope* arrived afterwards, \*she was so much disabled as to require repairs, and being delayed at Valparaiso for that purpose, the master preferred to have other coal purchased at Valparaiso, which could be put on board while his vessel was being repaired, and directed the coal at Coquimbo to be sent to San Francisco.

The defendant objected that this purchase was not within his instructions.

It presented a case where the agent, acting, as he supposed, for the best interest of his distant principal, under the circumstances, had nevertheless gone beyond the letter of his instructions. But, as the coal was purchased for the principal, it belonged to him if he chose to accept it. If the price had risen, and Cross had sold it, Law might justly have claimed the profit; and when informed by his agent of what he had done, if the principal did not choose to affirm the act, it was his duty to give immediate information of his repudiation. He cannot, by holding his peace, and apparent acquiescence, have the benefit of the contract if it should afterwards turn out to be profitable, and retain a right to repudiate if otherwise.

The principal must, therefore, when informed, reject within a reasonable time, or be deemed to adopt by acquiescence. The rule is said to be a "stringent one upon the principal in such cases, where, with full knowledge of the acts of the agent, he receives a benefit from them, and fails to repudiate the acts." See *Hoyt v. Thompson*, (19 N. Y., 218.)

Whether there was such acquiescence or not the judge left fairly to the jury.

III. The letter of Hackley was part of the *res gesta*, and properly admitted. The court instructed the jury that Mr. Law was bound by his advice or direction, because it was outside of his authority. The defendant cannot complain of this instruction.

IV. On the arrival of this coal in San Francisco the price of coal had fallen, and it became the interest of Law to have the loss thrown on Cross. Accordingly, Charlick, Law's agent to attend to his steamboats on the Pacific, assumed the power of repudiating the contract, and set up as a pretense that the coal was not good. As he refused to receive it, the coal was \*conse- [ \* 540 ] quently sold for the benefit of whom it might concern, and bid in by Charlick for a sum which paid the freight only, leaving the price paid for the coal by Cross unpaid.

The court properly instructed the jury that the authority of Charlick, as shown, was not such as to authorize him to repudiate the purchase, leaving it to the jury to say, from the evidence, whether the defendant had communicated to Charlick any specific authority to reject the coal, and also whether the coal was of proper quality or not, and what was the contract, or whether there was any parol contract between Cross and Charlick.

There can be no error imputed to this instruction, except that the jury were left to presume a private instruction to Charlick, of which there was no evidence. But plaintiff in error cannot complain of errors in his favor.

These are all the material points in the case that were properly raised on the trial below, and it is not necessary to vindicate our decision by a more minute examination of the facts. The court below has given correct instructions as to the questions of law really involved in the case, and properly refused to confuse the case by a specific answer to each of the twenty-eight points. Those not answered in the instructions we have noticed were either answered affirmatively or were wholly irrelevant.

Judgment of the circuit court affirmed.

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THE UNITED STATES, Appellants, v. VALLEJO.

1 Black, 541.

CALIFORNIA LAND GRANTS.

1. The claimant in this case produced two grants, one purporting to be made under the colonization laws of Mexico of 1824 and 1828, which is wholly invalid for want of compliance with any of the requirements of these laws.
2. The second is a sale of 100,000 acres of land for \$5,000, and a grant by the gov-

## The United States v. Vallejo.

error, signed by the secretary, in consideration of that sum, and raises the question whether the governor had authority to make such a sale.

3. These laws of 1824 and 1828 were the only laws passed by Mexican authority for the disposition of the lands of the republic; and the law of the Spanish cortes of 1813 was not in force, and never has been, in the republic.
4. The grant is also invalid for want of any record evidence of it in the proper book of that year, which is in existence, and for want of sufficient evidence of possession to overcome the absence of this record evidence.

APPEAL from the district court of California. The case is well stated in the opinion of the court and in the dissenting opinion.

*Mr. Black* and *Mr. Green*, for the United States.

*Mr. Reverdy Johnson* and *Mr. McCalla*, for appellee.

[ \* 549 ] \* Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the district court of the United States for the northern district of California.

The claim of Vallejo and his assigns covers a tract of land known by the name of Suscol, in the county of Solano, California, bounded on the north by lands named Tulucay and Suisun, on the east and south by the Straits of Carquines, Ysla del a Yegua, and the Estero de Napa, without any limitation as to quantity, and embraces from ninety to one hundred thousand acres, including Mare Island, on which the United States have established their navy-yard on the Pacific, and the city of Benicia, situate on the bay of San Francisco. Two grants of the tract of Vallejo were given in evidence—one a colonization grant, dated 15th March, 1843, and the other a grant founded on a sale for the consideration of \$5,000, dated 19th June, 1844. Both grants purport to be signed by Micheltorena, governor, and Francisco Arce, secretary *ad interim*.

From a letter of Micheltorena to Vallejo, 16th March, 1843, one day after the date of the colonization grant, in which he states that he transmits to him a title for the place named Suscol, and that he accepts the offer to pay \$5,000 for the same, it is reasonable to conclude that the colonization grant was intended to be founded on the contract of sale; and doubting, perhaps, that the grant could not be maintained in this form, the second was executed without any reference to the colonization laws.

A paper purporting to be a decree for the formal approval of these two grants by the departmental assembly, dated [ \* 550 ] 26th \* September, 1845, and signed by Pio Pico, and José Ma. Covarrubias, secretary, is in the record, but there is no evidence of its genuineness. It seems to have been given up as spurious.

The evidence of possession and cultivation is slight. Indeed, considering the magnitude of the tract granted, it is entitled to very little weight. As the grants were dated 1843 and 1844, and the country taken possession of by this government in 1846, there could be but two or three years' possession or occupation under them at the time of our taking possession. The evidence that Vallejo occupied and cultivated the tract previous to the grants, which, of itself, is slight and unsatisfactory, is still further weakened by the fact, which is shown, that the ranch had been occupied by the claimant as a military commandant with soldiers and government property.

The witnesses, who speak of the possession as early as 1841, might very readily have confounded this possession for the uses of the government with a possession for Vallejo himself. We can give very little weight to a possession so limited as to duration and in extent, when offered in support of a grant of ninety or one hundred thousand acres of land. If the grant cannot be maintained by its own force and effect, this possession will scarcely uphold it. Coming then to the grants, we may as well lay aside the first one, the colonization grant, at once, as entirely defective within the law of 1824 and the regulations of 1828. The only document in evidence is the naked grant itself. It would be a waste of time, after the numerous cases in this court on these titles, to go over the objections to this source of title.

The next is the grant founded on the sale, and which is the only one entitled to consideration.

The main objection to this grant is the want of power in the governor to make it; and this raises the question, whether or not the governor possessed any power to make grants of the public lands independently of that conferred by the act of 1824 and the regulations of 1828.

The Mexican congress, after the country had thrown off the government of Spain, and had erected a new and an independent government in its place, representing the sovereign [\* 551] power of the nation, passed the law of 1824 providing for the grant and colonization of the public lands.

The second section provides that the lands of the nation, which are not the property of any individual, corporation, or town, are the subject of this law, and may be colonized. Section third: For this purpose the congress of the States shall, with the least delay, enact laws and regulations for colonizing within their respective boundaries, conforming in all respects to the *constitutive act*, the *general constitution*, and the *rules established in this law*.

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The act then prohibits the colonization of any lands within twenty leagues bordering on any foreign nation, or within ten leagues of the sea-coast, without the consent of the supreme government; and further, that in the distribution of the lands preference is to be given to Mexican citizens; that no person shall be allowed to obtain a grant of more than eleven leagues; and that no person who may obtain a grant under the law shall retain it if he resides out of the limits of the republic.

The sixteenth section then provides, that the executive shall proceed, in conformity with the principles established in this law, to the colonization of the territories of the republic.

The supreme executive government, acting under the above sixteenth section, on the 21st November, 1828, established regulations for the granting and colonization of the public lands in the territories, and, among others, in California.

The first section declares, "that the political chiefs (the governors) of the territories are hereby authorized to grant vacant lands within their respective territories," "to either Mexicans or foreigners who may petition for them, with the object of cultivation or settlement. Said grants shall be made according to the laws of the general congress of 18th August, 1824, and under their qualifications."

Then follows a series of preliminary proceedings, specially enjoined for the purpose of ascertaining the fitness of the petitioner to receive a grant, and also of ascertaining if the land asked for may be granted without prejudice to the public or individuals; [ \* 552 ] and it is declared, in view of these, the governor \* will grant or not the land; but if the grant is made, it must be in strict conformity with the laws upon the subject, and especially with reference to the law of 1824; and the grants made to individuals or families shall not be definitively valid without the previous consent of the departmental assembly.

Section eighth. The grant petitioned for having been definitively made, a patent, signed by the governor, shall be issued, which shall serve as a title to the party, expressing therein that the grant has been made in strict accordance with the provisions of the law, by virtue of which possession shall be taken; and section nine, of all petitions and grants a record shall be made in a book kept for that purpose, with the plats of the land granted.

There are many other stringent provisions and conditions imposed which it is not important to refer to specially; it is sufficient to say, that the system thus established by the sovereign power of the nation for the grant and distribution of the public lands, exhibits



a deliberation and care over the subject that is in striking contrast with the system of granting the public lands under our government, and furnishes the highest evidence of the extreme interest the Mexican government took in guarding against impositions and frauds, by or upon the political chiefs in the execution of the law.

Now, the above are the only laws of the Mexican congress passed on the subject of granting the public lands, with the exception of those relating to the missions and towns, which have no bearing upon the question. No others have been produced on the argument, nor have our researches found any, nor were any others discovered by the public agents which were authorized by this government to inquire particularly into the subject. (See Halleck's Rep., March 1, 1849, Exec. Doc., 1st Sess. 31st Cong., p. 119; Jones' Rep., April 10, 1850, Senate Dock., 2d Sess. 31st Cong., p. 18; see also Calif. 3 Rep., pp. 23, 24, 25; ib. 37, 38; 20 How. 63; 21 ib. 177; 23 ib. 315; 24 ib. 349.)

The ground taken to uphold this grant concedes that no other power has been conferred upon the governor by any express act of the Mexican congress; but it is insisted that the \* law [ \* 553 ] of 1824, and regulations of 1828, did not repeal the power, if it previously existed, to make a grant of the public lands by sale for a pecuniary consideration; and the decree of the Spanish cortes, of January, 1813, is referred to as confirming that authority.

But any one looking into this law will see that it provides for a very different system of disposing of these lands from that found in the Mexican law of 1824, and the regulations of 1828; and unless specifically recognized or excepted, would necessarily be repealed as repugnant and inconsistent with the system adopted. After providing for the reduction of the public lands to private ownership in the way and with the qualifications stated, the act declares, that half of the vacant and crown lands of the monarchy shall be reserved as a security for the payment of the national debt, and of those to whom the nation is indebted, who are inhabitants of villages to which the lands are adjacent; and provision is made for the distribution of them to the public creditors belonging to these villages; also for distribution among the officers and soldiers of the army; and then provides, that the location of these tracts shall be made by a board of magistrates of the villages to which the lands are adjacent, and the proceedings are afterwards to be sent to the provincial deputation for approval.

The law then provides for grants of the residue of the vacant or crown lands to every inhabitant of the villages who ask for them for the purpose of cultivation, and has no land of his own. The

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patents are to be made by a board of magistrates free of charge, and the provincial delegation are to approve of them. The decree was to be published not only among all the people of the kingdom, but among the national armies, and in every way, so that it might come to the knowledge of all the subjects.

This law may be very properly referred to as the foundation and source of many titles to the public lands in the Mexican government, and also of titles in the province or territory of California, if any were derived under it during the authority of the Spanish government. The change of government would not affect [\*554] them. But grants made after this change, and the establishment of a new and independent government, present a very different question. Grants under this law were to be made to the creditors, officers, and soldiers of the old government. They were called *rewards for patriotism*, and were not to be extended to individuals other than those who may serve or who have served in the present war, (war between the Emperor Napoleon and Spain then existing,) or in quelling disturbances in some of the provinces beyond sea. Individuals, not military men, who had served in their districts, or contributed in any other way in this war, or in the disturbances in America, and who were injured or crippled, or disabled in battle, were included in the grants to be made. Serious disturbances existed in the vice-royalty of Mexico at this time, arising out of revolutionary struggles, headed by Hidalgo Morelos and Bravo. One of the objects of the law was to compensate and encourage the defenders of the mother government against these revolutionary movements.

Without pursuing the inquiry further, we think it quite clear that this law could not have been in force after the change of government, unless expressly recognized by the Mexican congress; and not then, without being first essentially modified in its policy and purposes; and certainly, unless thus modified, and the power in express terms conferred on the political chiefs of the territories to grant the public lands on sale, no such power can be derived from its provisions.

There are other serious objections to this claim. It is directed in the title-paper that a "note be made of it in the respective book;" and the secretary *ad interim* declares at the foot of the grant, "note has been made of this title in the respective book." The grant, as we have seen, was made 19th June, 1844. The book of records of that year is in existence, and in good condition. No record was made of the title. The note of the secretary is untrue. It was well said, in *The United States v. Sutter* (21 How. 175,) that "in every

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well-regulated government the deeds of its officers, conveying parts of the public domain, are registered or enrolled, to furnish permanent evidence to its grantees of the origin of their title." An exemplification of such a record is admissible as evidence of \* the same dignity as of the grant itself. (5 Peters, [ \* 555 ] 233; 15 How. 1.)

This rule exists in States which have adopted the civil law. In those States the deed is preserved in the archives, and copies are given as authentic acts—that is, acts which have a certain and accredited authority and merit confidence. The acts thus preserved are public instruments, and all doubts that arise upon the copies that may be delivered are resolved by a reference to the protocol from which the copies are taken, and without which they have no authority.

We add, it is important, also, that a record should be made of these grants, so that the government may be advised in respect to the portions of the public domain that have been sold or disposed of, and as a security against the frauds of the public officers upon whom the power of making the grants has been conferred. Grants of this description, when made in due and orderly form, are either made at the seat of government, where the public records are kept, and a record can be readily made, or, if signed by the public officer residing at a different place, are not deemed grants till the proper record is made.

Without this guard, the officers making the grants, as, in the present instance, the governor and secretary, would be enabled to carry with them in their travels blank forms, and dispose of the public domain at will, leaving the government without the means of information on the subject till the grant is produced from the pocket of the grantee.

Without pursuing the examination further, in every view we have been able to take of the case, we are satisfied that the grant is one that should not be confirmed, and we shall order the judgment below to be reversed, and the record remitted to the court to enter judgment for the United States.

Mr. Justice GRIER. I cannot consent, by my silence, that an inference should be drawn that I concur in the opinion just delivered. I cannot agree to confiscate the property of some thousand of our fellow-citizens, who have purchased under this title and made improvements to the value of many \* millions, [ \* 556 ] on suspicions first raised *here* as to the integrity of a grant universally acknowledged to be genuine in the country where it

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originated. I do not intend to enter into any argument with my brethren of the majority. If they are satisfied with the conclusion, the presumption is, that the minority is mistaken. And I would not wish to weaken any arguments that may be urged to justify this wholesale confiscation. I shall merely mention a few of the facts and principles on which I have been constrained to dissent.

This government has bound itself by a solemn treaty to respect all just claims which the citizens of California held at its date. I shall not comment upon the good faith with which this obligation has been observed, or whether it was acting in good faith to these new citizens to compel every owner of a grant or title under Mexico to enter into a long and expensive litigation, beginning at home and ending here; a litigation, too, with one who paid no costs, while it was ruinous to the claimant, who, if he retained one-half for himself, when successful, was considered fortunate. Instead of protection of their possessions, they were, in many instances, left a prey to squatters and champertons' attorneys. This was a great evil, but perhaps a necessary one. The change of sovereignty from Mexico to this government at once gave value to lands which before had none, and which Mexico was glad to give away to colonists for nothing. There unit of measurement was a square league, and eleven of these (nearly equal to 50,000 acres) was the only maximum. The sudden affluence of those of the former settlers who had retained any considerable proportion of their square leagues, and of those who purchased their titles for a trifle, caused not only a mania for land speculation, but a system of extensive frauds, with forged grants and perjured witnesses, such as the world has seldom witnessed. If a large grant of land in California, like the one before us, were suddenly produced from the pocket of some obscure person, such as José de la Rosa or Santillan, it should excite suspicion and be scrutinized with the utmost rigor. But where a grant is public and notorious, without suspicion of fraud or forgery—where a large consideration was paid to the Mexican [ \*557 ] \*government—where possession has been taken and held for sixteen years—where numerous purchasers have made improvements worth millions, it is the duty of the court to deal with it according to the rules of equity and justice, instead of applying sharp rules of decision to inflict a forfeiture.

In a country where land had no value, where it was freely given to all who asked, without money and without price, in amounts not to exceed fifty thousand acres, it will be supposed that there are few cases to be found where the government could raise money by the sale of it. This is, perhaps, the only case to be found where such

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a sale has been made. The laws of 1824 and 1828 were colonization laws; they regulated grants of land made for this purpose, and restrained the power of the local government as to the amount to be given to one person. They prescribed the proceedings and forms necessary to the validity of such grants. This sale to Vallejo was not a colonization grant, nor were the regulations of 1824 and 1828 applicable to it, nor the decisions of this court in the ratification of grants under them.

That there was a sale by the governor to Vallejo for a consideration paid, when the governor could find no other way to raise funds for the support of the government, is satisfactorily proved. It was a matter of general notoriety at the time. The copy of a letter from the governor to the grantee accompanying the title is found among the archives. The first title being defective in form, another was given confirming the sale and acknowledging a consideration paid. Possession has followed in pursuance of it. Its authenticity was admitted in the court below. But we are about to forfeit the title on the ground that the governor, though he might give away land to any amount, had no authority to sell it for money. It is assumed, that because there was a special power given by statute to grant to colonists, therefore he had no other power. This court has frequently decided that the authority of a governor to make such a grant will be presumed from the fact that he did make it, and that it lay upon those who deny the power to prove the want of it.

But it is assumed that the power did not exist since the \*regulations of 1824, because it was not exercised. It [\*558] is a much better reason for the want of a precedent that land would not be sold where it had so little value that it might be had as a gift to the extent of 50,000 acres.

If this treaty is to be executed in good faith by this government, why should we forfeit property for which a large price has been paid to the Mexican government, on the assumption that the Mexican government would not have confirmed it, but would have repudiated it for want of formal authority? Vallejo was an officer of the army, high in the confidence of the government. His salary as an officer had been in arrear. In a time of difficulty he furnishes provisions and money to the government of the territory. How do we know that Mexico would have repudiated a sale of 80,000 acres as a robbery of its territory, when any two decent colonists, having a few horses and cows, could have 100,000 for nothing?

I believe the Mexican government would have acted honestly and honorably with their valued servant, and that the same obligation rests on us by force of the treaty.

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Now that the land under our government has become of value these grants may appear enormous; but the court has a duty to perform under the treaty, which gives us no authority to forfeit a *bona fide* grant because it may not suit our notions of prudence or propriety.

We are not, for that reason, to be astute in searching for reasons to confiscate a man's property because he has too much. Believing, therefore, that in the case before us the claimant has presented a genuine grant for a consideration paid, which the Mexican government would never have disturbed for any of the reasons now offered for confiscating it, I must express, most respectfully, my dissent from the opinion of the majority of the court, with the hope that congress will not suffer the very numerous purchasers to forfeit the millions expended on the faith of treaty obligations.

Mr. Justice WAYNE. I have examined this case with much attention, and concur in the conclusions of my brother, Mr. Justice GRIER; and will add, that as I have neither seen [ \* 559 ] \* nor heard anything in the case so conclusive as the judicial opinion of our brother, Judge McAllister, I have determined that the best course which I can take to counteract the conclusion to which this court has come in this case, will be to adopt his opinion on the law of the case as more expressive of my dissent than anything I could add. The part of it which I refer to is as follows:

"This case is to be considered as one in which the title-papers are admitted to be genuine, the payment of a money consideration paid, and the possession of the claimant, as was ordinarily taken under the laws and usages of Mexico, established. The sole grounds taken by the government, on which the validity of this claim is resisted, are:

"1. That no witness proves that a house was built within one year from date of the grant of 1843. That a house was built upon the land prior to the date of either grant by the claimant is clearly proved. That a second house was not built, (as subsequent condition,) especially in the case of an absolute sale, could not authorize a court of equity to forfeit any interest which has become vested in the claimant.

"2. The second ground is, that the grant of 1844 is invalid, because it is without restriction, and for a consideration of \$5,000 in money.

"3. Because the governor has exceeded his power in making a grant for the excess of eleven leagues.

“The two last objections, which urge the grant to be void because it was a sale for a money consideration, and because it exceeds in quantity eleven leagues, will be considered together. These objections apply to the second grant of 1844, which purports to be on its very face an absolute sale.

“This grant cannot be deemed, in the language of the supreme court of the United States in the *Cambuston* case, (20 How. 64,) ‘a pure donation without pecuniary consideration or meritorious services rendered to the government.’ Nor does it purport to be issued under the Mexican colonization law of 1824, or the regulations of 1828. It is treated by the government attorney for what it really is, an unrestricted sale for a pecuniary consideration. Had it been a pure donation, \*made professedly under the laws [ \* 560 ] of Mexico, professing to have been issued by virtue of those laws, and in pursuance of the terms and provisions prescribed by them, proof of a compliance with the restrictions by the governor would not have been afforded by the recitals in the grant of his having done so, especially if there had been doubt of the *bona fides* of the grant. This is the extent to which the court went in the *Cambuston* case.

“It does not apply to a *bona fides*; all made to supply the necessary wants of the government, and applied to the removal of them. If so intended, its practical effect would be in the present and all analogous cases to nullify the applications of the ‘principles of equity,’ which are made one of the rules of decision by the act of congress for this court in the exercise of the jurisdiction conferred on it. Nothing was said by the supreme court to justify such conclusion. In that case they use language which indicates that if the grant had not been a mere donation, had been free from suspicion, for meritorious services rendered to the government, or a pecuniary consideration, the claimant would have stood on a different footing. They say, (20 How. 64,) ‘In the examination of this case, we have found it very difficult to resist a suspicion as to the *bona fides* of the grant. It is a pure donation, without pecuniary consideration or meritorious services rendered to the Mexican government.’

“In the case of *Fremont v. United States*, Taney, C. J., says: ‘And the grant was not merely to carry out the colonization policy of the government, but in consideration of the public and patriotic services of the grantee. This inducement is carefully set out in the title-papers; and although this cannot be regarded as a money consideration, making the transaction a purchase from the government, yet it is the acknowledgment of a just and equitable claim, and when the grant was made on that consideration the

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title in a court of equity ought to be as firm and valid as if it had been purchased with money on the same conditions.'

"Now, in this case the grant was made for a money consideration by the governor, to obtain, and who did obtain by it, [ \*561 ] \*the means to maintain the starving soldiers of the country at a critical moment of its then condition. This fact is ascertained by the official communication of the governor to the grantee, found in the Mexican archives for the year 1843, and referred to in another record for the same year. The grantee was in possession, open and notorious, for three years, undisturbed, prior to the occupation of this country by the Americans. Under such circumstances, could the Mexican government, had it continued, have refused to have recognized the claim of the grantee with justice or equity?

"If the facts, that the government received a pecuniary, and, for aught that appears, adequate consideration, must necessarily avoid the grants, with the other circumstance, that the quantity of land granted exceeded eleven square leagues, it must be done because these grants are within the operation of the colonization law of Mexico of 1824, in relation to the distribution of lands by donation, to carry out the colonization policy exclusively, and which restricts the quantity of lands to any one individual to eleven leagues.

"The power to give under certain restrictions, made evidently to prevent fraud in the distribution, did not, by implication, repeal the power, if it previously existed, to sell for a pecuniary consideration, if *bona fide* exercised.

"That such power did exist in the governors, the court will now consider, and give its reasons for the conclusion to which it is arrived.

"In a work published in 1829, in the city of Mexico, among the laws supposed to be retained in Mexico is the decree of the Spanish cortes of January 4th, 1813. This law evinced a spirit and policy evidently more liberal than had previously animated Spanish legislation, and which probably did not operate in Spain, or any of its then colonies, but, it is reasonable to believe, that in common with other decrees of the Spanish cortes was called into active existence by the Spanish revolution of 1819, and was in force at the time of the independence of Mexico.

"Such is the view enunciated by the board of land commissioners in the case of the City of San Francisco v. United [ \*562 ] \*States, and the publication of the decree in Mexico, in 1829, as one of the retained laws, as of force, confirms the opinion of the board.



"The supreme court of this State, in the case of *Cohas v. Raisin*, (3 Cal. 443,) distinctly affirm its existence, and cite the compilation in which it is given as '*Leyes Vigentes*,' p. 58.

"That tribunal, in the case of *Welch v. Sullivan*, (8 Cal. 168,) again affirm the existence of this decree. They say the decree of the cortes in 1813 directs, etc.

"But there is internal evidence afforded by the Mexican legislation on the subject of colonization, that the existence of the decree of 1813 was known, and legislation was enacted in view of some of its provisions. The *diseño* making the boundaries of the land petitioned for, which is required to accompany the application to the governor, is in conformity to the decree of 1813. Again, the conditions usually inserted in the colonization grants under the Mexican law and regulations are similar to those prescribed in the 2d section of that decree. This, in its preamble, among other things, declares its object to be 'to furnish with this class of lands (public lands) in aid of the public necessities (wants) to reward meritorious defenders of their country, and citizens who have no property.' The evident intent of this decree, declared on its face, is, that common or public lands should be converted into private property, and lands granted should be distributed in full property, and with established metes and bounds. Upon a careful revision of this decree the conclusion must be, that in the absence of other legislation the carrying out this decree must have devolved on the executive department, and the governors of California, under the instructions of the supreme government, would have the power to grant common lands. Now by that decree the quantity of land granted to one individual was not limited to any given quantity; but as to persons, it was limited to citizens.

"The only instance in which quantity is limited is in certain donations to certain official persons, to whom small lots of prescribed extent were to be granted. This decree authorized grants to meritorious defenders, and a sale of land to aid the public necessities; and such sale, made in good faith, would \* be the [ \* 563 ] legitimate exercise of power, unless the provisions of the decree confirming the power have been repealed by subsequent legislation. Have they been repealed, expressed or by fair implication, by the colonization law of 1824 of Mexico, or by the regulations of 1828?

"Animated by a more liberal view of her interests, Mexico determined to afford inducements to emigration, and she opened her public lands to foreigners as well as citizens, and determined to make donations for colonization purposes to all who strictly com-

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plied with the terms which, in the distribution of the land, she prescribed to prevent fraud. Among these was limiting the quantity of land in any donation to a single person to eleven leagues. There are many reasons for the legislation of Mexico to surround her system of colonization with checks and limits when the governors were to distribute the public lands, which do not apply to a *bona fide* sale for money consideration. Such is not a case which, by implication, should be brought within the colonization laws. The construction of a law, from the action of those whose duty it is to carry it out, should be considered when endeavoring to ascertain the intention of the legislature. The fact that sales have been made by governors of lands in quantities of more than eleven leagues, who would grant by donation to a colonist not more than eleven, is a circumstance not to be disregarded.

“By the record of the case, *United States v. Rodriguez*, No. 479, among the files of the papers of the board of land commissioners, it is made to appear that governor Pio Pico issued a grant for twelve leagues in consideration of the sum of \$12,000, past indebtedness to the government. The board of land commissioners confirmed the claim. The land in that case is situated in the southern district, and the records inaccessible to us, and it is impracticable to ascertain whether any appeal is pending, has been made, or been dismissed. The opinion of the board is, however, on file among the archives in the surveyor general's office. In

that opinion it is stated, ‘that in consequence of the importance of the two questions \*involved, the court took the case under advisement, and also for the reason that the determination of the case would settle the fate of a large number of cases undetermined, so far as the action of that tribunal was concerned.’ The first of those questions involved the only two grounds taken in the present. It was, whether the power of the government of California, under the Mexican authority, existed to sell or grant for a consideration of money, or with limits to exceed in amount eleven leagues. The board decided that he had such power.

“In the case of *The United States v. M. G. Vallejo*, No. 321, the same tribunal affirmed the principle decided in the previous case, and confirmed the claim to fifteen leagues. In their opinion the board say, ‘there appears no objection to the confirmation of this claim, except that it exceeds in amount the maximum authorized to be granted under the provision of the colonization law. The last five leagues do not appear to have been granted under those provisions, but a sale for an actual consideration received by

the government of two thousand dollars. This point was fully considered and decided by the court in case 479, and the doctrine recognized that a *bona fide* sale, made for a full consideration, by the governor of California, under the Mexican laws, vested in the purchaser both a legal and equitable interest, of which he would not be divested by the government by any rules of law or equity.' No power, certainly, was given by the colonization law of 1824, authorizing the governor to grant by way of sale, under any circumstances. If, therefore, he does not possess the power independently of that law, it exists nowhere, and a money consideration need not to have been referred to the U. S. supreme court to illustrate the equities of parties applying for a confirmation of their grants.

"In the Cambuston case, (20 How. 4,) they assign as a reason for a strict interpretation of the claimant's grant, and its want of equity, that there had been no pecuniary consideration paid. In Fremont's case, (17 How. 558,) they refer to the fact that the grant was given for meritorious and patriotic services, and should place the claimant on a footing with one who had purchased with money, and thus give a just and equitable [\* 565] claim against the government, the title to which in a court of equity would be firm and valid.

"No sale, it would seem, for any amount of money, could be legal so as to pass a title, if it be conceded that no power on the part of the governor to make a grant of the kind existed. It does appear to me, that when the supreme court refers to the money consideration of a grant as vesting in the holder of it a superior equity, by so doing they have at least not decided that the governor's act was void.

"They must have acted under the impression that the power to sell in good faith was in the governor, or that the equity of the case was such as gave 'a just and equitable claim against the government,' the title to which in a court of equity would be 'firm and valid.' In either view, but especially on the ground of a power in the governors of California, apart from the colonization law, to aid in good faith, by a sale of land, the public necessities, this court considers that a decree affirming that of the board of land commissioners in this case must be entered."

The CHIEF JUSTICE, Mr. Justice CATRON, Mr. Justice CLIFFORD, and Mr. Justice SWAYNE, concurred in the opinion of Mr. Justice NELSON.

Decree of the district court reversed and record remitted, with a mandate ordering that the claimant's petition be dismissed.

JOHN D. and JOHN G. INBUSCH, Plaintiffs in Error, v. FARWELL.

1 Black, 566.

PARTNERSHIP—DELIVERY BOND.

1. Where the property of A, B, and C, partners, was attached on mesne process, and delivered up on a bond conditioned for its production if judgment should be obtained against the defendants, and the suit was afterwards dismissed as to A and B for want of jurisdiction, and judgment against C's administrators: held, that the sureties were liable, because the judgment was recovered for the partnership debt, and the partnership property was released by virtue of the bond.
2. That by reason of the act of February, 28, 1839, suit may be maintained against part of the obligors in the bond in the federal court, though another obligor is beyond the reach of the court's jurisdiction and is not served.

WRIT of error to the district court for the district of Wisconsin.  
The case is stated in the opinion.

*Mr. Reverdy Johnson*, for plaintiffs.

*Mr. Hawley*, and *Mr. Stanbery*, for defendants.

[ \*567 ] \* Mr. Justice CLIFFORD delivered the opinion of the court.

This is a writ of error to the district court of the United States for the district of Wisconsin. As appears by the transcript, the suit was brought on the nineteenth day of October, 1859, by the present defendant, and the proceedings in the suit show that he had judgment in the court below, and that the original defendants sued out this writ of error. It was an action of debt, upon a bond signed by one James Buchanan, for and on behalf of himself, Henry Eastman, and Patten McMillan, as principal, and John G. Inbusch and John D. Inbusch, as sureties. Process issued against all three of the obligors who signed the bond, but service was not made upon the principal, for the reason that he was out of the jurisdiction of the court.

Referring to the recitals of the bond, it will be seen that it was given for the discharge of certain personal property at-  
[ \*568 ] tached \*by the marshal, and held by him at the date of the bond, under a process of attachment duly issued by the district court of the United States for the same district against said James Buchanan and the other two individuals, for and on whose behalf he professed to act in executing the instrument. They were copartners in the lumbering business, under the firm-name and style of Buchanan, Eastman & Company, and in the course of their trade became indebted to Charles B. Farwell, the

obligee of the before-mentioned bond. He held against their firm two promissory notes, both dated October fifth, 1857, and made payable at the Galena Bank, with interest, at the rate of ten per cent. One was for the sum of two thousand dollars, payable in ninety days from date, and the other was for one thousand dollars, payable in four months, and both were signed in the name of the firm. Both notes being overdue and unpaid, the promisee, on the twelfth day of February, 1858, brought suit against the three partners to recover the amount. When he filed the *præcipe* he also filed a bond and affidavit for a summons with attachment, and the process duly issued in that form. Pursuant to the command of the precept, the marshal attached a large quantity of pine lumber belonging to the copartnership, consisting of pine boards, shingles, and saw-logs.

Proceedings for the collection of debts in the district court of the United States for that district are regulated by the laws of the State composing the district, in consequence of a rule to that effect adopted by the court. Accordingly the marshal made an inventory of the property attached, and caused the same to be appraised by two disinterested freeholders of the county. They appraised the property attached at the sum of six thousand four hundred and fifty dollars, as appears by their certificate appended to the return of the marshal. By his return, it also appears that, on the sixteenth day of the same month, he made due service of the process upon Buchanan and McMillan, two of the partners, by giving to each a certified copy of the process, and also of the inventory made by him of the property attached. All three of the defendants appeared, by attorney, on the first day of March following, \* and on [ \* 569 ] their motion it was ordered by the court that the property attached be released, and the attachment discharged on the defendants filing a bond, with sureties, to pay the amount as ascertained by the inventory and appraisement. Ten days afterwards the marshal was furnished with a certified copy of the order of the court, and upon the defendants in that suit filing the bond on which the present suit was brought, he released the property and discharged the attachment.

Recurring again to the bond, it will be seen that it was framed upon the condition that if the defendants in this suit, "or either of them, will, on demand, pay to the plaintiff in said action the amount of the judgment that may be recovered against the defendants in the action, not exceeding the recorded sum, then this obligation to be void; otherwise to be and remain in full force and effect."

Two pleas were filed by the defendants in this suit: First, they

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alleged that the writing obligatory, on which the suit was brought, was not their deed. Secondly, they alleged, in effect, that the plaintiff in the attachment suit did not recover judgment against the defendants in that suit for any sum whatever, as by the record thereof, now remaining in the court, would more fully appear, and concluded with a verification.

To the second plea the plaintiff replied, specially setting forth all the proceedings in the attachment suit as already given, and averring in addition thereto that the defendants appeared in the case on the 24th day of March, 1858, and pleaded to the jurisdiction, alleging, that at the commencement of the suit they were citizens of the State of Illinois, and not citizens of the State of Wisconsin, as alleged in the declaration. They also alleged that two of the defendants afterwards, on the seventeenth day of November, in the same year, made and filed in the cause a suggestion of the death of the other defendant; and that on the 10th day of January, 1859, he, the plaintiff, filed a replication to their plea to the jurisdiction of the court, denying the matters therein alleged, and averring that some one or more of the defendants were citizens of the State of Wisconsin, as was alleged in the declaration. That he, the plaintiff, there-  
[ \* 570 ] after, on the eighth day of April following, by \* leave of court, entered a discontinuance as to Buchanan and Eastman, because they were out of the jurisdiction, as alleged in their plea; and, that on the twenty-first day of the same month, the administrator of the deceased defendant, McMillan, appeared as a party defendant in the suit.

These allegations were also accompanied by others, to the effect that the suit was duly revived against the administrator of the deceased partner; that the parties went to trial on the issue tendered and joined, and that the jury returned their verdict in favor of the plaintiff, and that the cause was then, for the want of a plea in bar of the action, referred to the clerk to compute the damages, and upon his report coming in, judgment was entered for the plaintiff in the sum of three thousand three hundred and seventy dollars and forty cents. Whereupon the defendants filed a rejoinder, averring that all the facts set forth in their second plea were true, and repeating the denial that the plaintiff ever recovered judgment against the defendants named in the bond. Upon these several matters they tendered an issue to the country, and on that issue the parties went to trial. To maintain the issue on his part, the plaintiff introduced the bond and a duly certified copy of the record in the attachment suit, and proved that he demanded payment of the amount before the suit was brought.

No testimony was offered by the defendants for the reason, doubtless, that their defense was, and still is, that the plaintiff failed to make out his case. They accordingly requested the court to instruct the jury that the record of the attachment suit showed that the plaintiff did not recover judgment against the defendants in that suit within the true intent and meaning of the bond, and, consequently, that there had been no breach of the condition therein set forth; but the court refused the prayer, and instructed the jury, substantially, that the suit would lie to recover the amount of the debt, interest, and costs of the judgment rendered in the attachment suit, and that the proofs introduced by the plaintiff showed a forfeiture and breach of the condition of the bond on the part of the defendants.

Exceptions were duly taken by the defendants, both to the \* refusal of the court to instruct the jury as requested, [ \* 571 ] and to the instructions given, as more fully set forth in the transcript.

I. It is not denied that the defendants in the attachment suit were partners, as alleged in the declaration; and it is equally clear that the suit was brought to recover a debt due the plaintiff from the partnership, and that the property attached by the marshal was partnership property.

But it is insisted by the defendants that the judgment recovered in that case was not in terms a judgment such as is described in the bond, and that they, the present defendants, being sureties, have a right to stand upon the letter of their contract. On the other hand, it is insisted by the plaintiff that the suit was well prosecuted, under the circumstances stated, against the administrator of the deceased defendant, and that the judgment, although against but one of the partners, yet being a judgment upon a partnership debt in a case where the other partners were out of the jurisdiction of the court, the effect of the judgment was to bind the property attached by the marshal, so that it would have been his duty, if no bond had been given, to have sold the same, and appropriated the proceeds to the payment of the execution issued upon such judgment.

Jurisdiction in the federal courts is not defeated by the suggestion that other parties are jointly liable with the defendants, provided it appears that such other parties are out of the jurisdiction of the court; but it is expressly provided by the act of the 28th of February, 1839, that the judgment or decree rendered in the case shall not conclude or prejudice other parties not regularly served with process, or not voluntarily appearing to answer. 5 Stat. at Large,

32; *D'Arcy v. Ketchum et al.* (11 How. 165;) *Clearwater v. Meredith et al.* (21 How. 492.)

Under that law, therefore, without more, it is clear, that if Buchanan and Eastman had not been made parties to the suit, it might have been regularly prosecuted against the other defendant in his lifetime, and after his decease might have been revived and prosecuted against his administrator; and it is [ \* 572 ] \* equally clear, that by the law of the State, and the rule of the court adopting the same, it was competent for the plaintiff, under the circumstances, to discontinue as to Buchanan and Eastman, and proceed against the administrator of the other partner. Sess. laws, 1856; see code, sec. 25, p. 10.

It is not questioned that the administrator voluntarily appeared in the case, and the record shows that the proceeding reviving the suit was regular and according to law. These considerations lead necessarily to the conclusion, that the judgment against the estate of the deceased partner was a valid judgment, and that the only question of any importance in the case is as to its effect upon the rights of those parties.

II. Some light will be shed upon the question by referring more definitely to the course of proceeding under which the bond was given, and the property attached released. By the law of the State, it is provided, that whenever the defendant shall have appeared in the action, he may apply to the officer or to the court for an order to discharge the attached property; but to secure that right, he must deliver to the court or officer an undertaking executed by at least two sureties, residents and freeholders in the State, approved by such court or officer, to the effect that the sureties will, on demand, pay to the plaintiff the amount of the judgment that may be recovered against the defendant in the action, not exceeding the sum specified in the undertaking.

Appearance was accordingly entered in the case by the attorney of the defendants in compliance with that requirement, and for the purpose of procuring the discharge of the property held by the marshal. Attachments are made for the benefit of creditors, but the provision for the discharge of the property attached is made for the benefit of debtors. They may demand as matter of right, on complying with the requirements of the law in that behalf, to have their property discharged from attachment, and that a bond with sureties be accepted in its place. Under those circumstances, it is quite obvious that the bond becomes a substitute for the property released; and where there are no special circumstances to render the case an exceptional one, it must be held that any judgment



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that would \* have bound the property, if it had remained [ \* 573 ] under attachment in the hands of the marshal, will bind the obligors of the bond in a case like the present, where the suit was commenced against the partnership upon a partnership contract, and the property attached was partnership property.

Discontinuance as to the partners, not within the jurisdiction of the court, was properly allowed under the law of the State and the practice of the court. Beyond question, therefore, it was a valid judgment upon a partnership debt; and although it was against the estate of but one of the partners, still, if the property attached had not been released, it would have been the duty of the marshal, under the law of the State and the practice of the court, to have sold the same, and appropriated the proceeds to the payment of the execution issued upon the judgment. Rev. Stat. Wis. 1849, sec. 41, p. 539.

Although the other partners were not prosecuted to judgment, because they were out of the jurisdiction of the court, still the judgment was rendered upon a partnership debt, to which it would be the duty of the marshal to apply partnership property in preference to the debts of the individual partners. Sureties in the bond were sureties for the partnership for the purpose therein described, and if compelled to pay the amount they clearly have a right of action against all who composed the firm at the time they assumed the liability. *Gay v. Johnson et al.* (32 N. H. 167;) Story on Part. sec. 375; Collier on Part., 3d ed., sec. 713, p. 630; *Benedict v. Stevens*, (25 Conn. 392.)

Judgment was recovered, therefore, in this case for the partnership debt, and if the property attached had not been discharged it must have been appropriated to liquidate the judgment, and we think the bond must be regarded as a substitute for the property, and consequently that the rulings and instructions of the district court were correct.

Judgment of the district court affirmed.

## THE PROPELLER COMMERCE.

THE TRANSPORTATION COMPANY, Appellants, v. FITZHUGH and others, 1b 574  
Led 107  
190 557

1 Black, 574.

## ADMIRALTY JURISDICTION—LOCALITY OF COLLISION.

1. It is not essential to the jurisdiction of the district courts as courts of admiralty, in cases of collision, that either vessel should be engaged in foreign commerce or in commerce between the States.

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2. Nor is the jurisdiction defeated because the place of collision was within the body of the county of a State.
3. The suit in such cases may be prosecuted either *in personam* or *in rem* in any district where the person or the vessel is found, though the collision occurred in a different district.
4. The owner of the vessel injured can recover not only for the injury to his vessel, but also for the damage to his cargo.

APPEAL from the circuit court for the southern district of New York. The case is stated in the opinion.

*Mr. Benedict*, for appellants.

*Mr Grant*, for appellees.

[ \* 575 ] \* Mr. Justice CLIFFORD delivered the opinion of the court.

This was a libel in admiralty in a cause of collision, civil and maritime, and the case comes before the court on appeal from the decree of the circuit court of the United States for the southern district of New York.

Recurring to the transcript, it will be seen that the libel was *in rem* against the steam propeller "Commerce," and that the suit was instituted by the appellees, as the owners of the lake boat *Isabella*; but the record shows, that after the process was issued, and the vessel was taken into custody, the appellants, on motion, had leave to appear, and having waived publication of notice and entered into stipulation, with sureties, both for costs and value, the vessel was discharged by consent, the stipulators agreeing, that in case of default or contumacy of the claimants, execution might issue for the amount of the stipulation against their goods, chattels, and lands. No change, however, was made in the form of the libel, and the whole proceedings in the suit were as *in rem* against the vessel. Reference will only be made to such portions of the pleadings as seem to be indispensable to a full understanding of the several questions presented for decision. Among other things, the libelants alleged, that the *Isabella* left the port of New York on the nineteenth day of August, 1852, for the port of Albany, fully laden with merchandise; that she, with certain other boats and barges, was in tow of the steam-tug *Indiana* during the voyage, and at the time the collision occurred; that the steam-tug was well manned, tackled, apparelled, and furnished, and in all respects competent for the business in which she was engaged; and that the craft composing the tow had on board the proper complement of officers and men for their protection and management. Two of the barges were attached to the steam-tug, one on the larboard

and the other on the starboard side; and to show that there was no fault in the arrangement of the tow, they alleged that the *Isabella* was securely attached to the larboard side of another barge, and that both were towed astern of the steam-tug, at the usual and proper distance, by means of a hawser; and, in respect to the immediate circumstances of the \*collision, they al- [\* 576 ] leged that the *Isabella*, in the evening of the following day, while ascending the river, in tow of the steam-tug as aforesaid, and when about ten or eleven miles below the port of her destination, was met by the propeller, coming down the river, and bound on a voyage from the port of Albany to the port of Philadelphia; and they aver that, that at the time of such meeting, the steam-tug, with all the boats and barges in tow of her, was on the eastern side of the channel, and in the usual and proper place for such craft when so ascending the river; but that the propeller, after she had passed the steam-tug in perfect safety, suddenly and improperly sheered to the eastward, and, through the negligence of those in charge of her, ran against the larboard bow of the *Isabella*, stove the bow from the stem, broke all the lines by which she was attached to the barge, and so damaged her that, in a few minutes, she sunk in the river, with all her cargo on board. As alleged in the libel, her cargo consisted of groceries and other merchandise, together with a steam-engine; and the libelants alleged, that the whole amount of the loss, including the damage to the cargo, was seventeen thousand dollars. When the libel was filed, the propeller was in the port of New York, and, as the libelants alleged, within the jurisdiction of the district court. Accordingly, they prayed process, in due form of law, as in cases of admiralty and maritime jurisdiction, and it was issued and duly served upon the vessel. On the other hand, the claimants denied the allegation that the steam-tug was well manned and equipped, or that the boats and barges in tow of her had a full complement of officers and men for their protection and management, or that the tow was properly made up, and especially that the *Isabella* was at no greater distance astern of the steam-tug than was usual and proper. They admitted, however, that the propeller passed the steam-tug in safety, and met the *Isabella* at the time alleged, but denied that the steam-tug, or the boats and barges in tow of her, were on the eastern side of the channel, or in a proper place for such craft when ascending the river.

Their theory was, that the lower barge, with the boat of the libelants attached, was on the western side of the channel, \*and they accordingly alleged that the tow was out [\* 577 ]

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of the usual and proper place; and they expressly denied that the propeller, after passing the steam-tug, sheered at all, or so moved towards the eastern side of the channel as to cause the collision. Witnesses were examined on both sides in the district court, and, after a full hearing, a decree was entered dismissing the libel, and the libelants appealed to the circuit court. Additional testimony was taken on the appeal, and the circuit court reversed the decree of the district court, and entered a decree in favor of the libelants. Whereupon the claimants appealed to this court, and now seek to reverse the last-named decree.

It appears from the evidence that the steam-tug, when she started from New York, had seven boats and barges in tow, but the number, although she left one at Kingston, was increased to ten in the early part of the trip. On arriving at Athens, the master, as he had been accustomed to do, rearranged the tow, in order to make it narrower for the residue of the voyage. Briefly stated, the arrangement was as follows: Two of the craft were lashed, as before, to the sides of the steam-tug; but they had two others at their stern, which were connected with them by lines put out from the stem of the boat in the rear, and attached to the stern of the boat ahead. Four of the residue, arranged abreast and lashed together, were connected with the steam-tug by a hawser about two hundred feet long, and the barge to which the boat of the libelants was attached was some three or four hundred feet astern of the whole, and was also connected with the steam-tug by a hawser. With the tow arranged in the manner described, the steam-tug proceeded slowly up the river, and passed Mull island in perfect safety. Shortly after passing the island, the master of the steam-tug, who was standing in the wheel-house, discovered two steamers coming down the river, and as they were not far distant, he went aft to see to the tow. They proved to be the propeller and the steamer Oregon, and the former, in a few minutes, passed the steam-tug some fifty or a hundred feet to the westward—so far to

the west, that a schooner under mainsail and foresail, and [ \* 578 ] with her main \* boom out, was between the propeller and the steam-tug at the time the former passed the latter.

Seeing the schooner coming up, the Oregon stopped until the schooner passed out of the way, but the propeller proceeded on her course, without any abatement of her speed, and after passing the steam-tug, and the four boats arranged abreast, sheered to the eastward, and struck the stem of the libelants' boat, and, as the witnesses state, drove it into the cabin, and parted all the line which attached the boat to the barge. Some conflict exists in the testi-

mony-as to the precise locality where the collision occurred; but the clear inference from the whole evidence is, that it took place just after the barge, with the boat of the libelants attached, passed the point of Mull island, and it is conceded that the island is within the northern district of New York, and within the body of one of the counties of that State. Want of jurisdiction was not suggested, either in the district or circuit courts; but it is now insisted that the case was not cognizable in the district court, for three reasons: First, because it did not appear that the propeller or the boat of the libelants was engaged in foreign commerce, or in commerce between the States, and, therefore, was not a case cognizable in the admiralty; second, because the collision occurred within the body of a county, and, therefore, was exclusively cognizable at common law; thirdly, because, assuming it to be a case of admiralty and maritime jurisdiction, still it was properly cognizable in the northern district of New York, and not in the southern, where the decree was rendered.

1. But the first objection could not be sustained, even if it were admitted, on the theory of fact assumed, that it was correct, for the plain reason that it is alleged in the libel, and not denied in the answer, that the propeller was bound on a voyage from the port of Albany to the port of Philadelphia, and one of the witnesses of the claimants testified that she was employed in her second trip, and that, notwithstanding the collision, she completed her voyage.

Admiralty jurisdiction, however, was conferred upon the government of the United States by the constitution, and in cases of tort it is wholly unaffected by the considerations suggested in the proposition. Such certainly were the views [\* 579] expressed by this court in the case of the *Genesee Chief*, (12 How. 452,) where the court say: "Nor can the jurisdiction of the courts of the United States be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the constitution by separate and distinct grants." When the district courts were organized, they were authorized by congress to exercise exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation, or trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas. That provision of the judiciary act remains in full force and unrestricted as applied to the navigable waters of the Hudson and all the other navigable waters of the Atlantic coast which

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empty into the sea, or into the bays and gulfs that form a part of the sea. All such waters are, in truth, but arms of the sea, and are as much within the admiralty and maritime jurisdiction of the United States as the sea itself. It is not denied that the admiralty has jurisdiction of torts committed on such navigable waters, nor is it denied that the waters of the Hudson, where the collision in this case occurred, are within the admiralty and maritime jurisdiction of the United States; but it is insisted that something more is wanting in order to bring the case within the cognizance of the admiralty. Our reply to that suggestion is, that locality, by all the authorities, is the test, in cases of tort, by which to determine the question whether the wrongful act is one of admiralty cognizance; and if it appears, as in cases of collision, depredations upon property, illegal disposition of ships, or seizures for breaches of revenue laws, that it was committed on navigable waters, within the admiralty and maritime jurisdiction of the United States, then the case is one properly cognizable in the admiralty. 1 Cur. Com. p. 33, sec. 37.

2. It is assumed, in the second place, that the jurisdiction must be denied, because it appears that the collision occurred [ \* 580 ] \* on the Hudson river within the body of a county; but the objection presents a question that has long since been settled by this court. It was first presented in the case of *Waring et al. v. Clark*, (5 How. 452,) where this court held that the question of jurisdiction was unaffected by the fact that the locality of the collision was *infra corpus comitatus*, provided it occurred in waters where the tide ebbed and flowed, which is a rule sufficiently comprehensive to control this case. That decision, however, preceded the case of the *Genesee Chief*, 12 How. 443, where the same rule was declared to be applicable to the lakes and the navigable waters connecting the same, although not affected by the ebb and flow of the tide. Similar views were also expressed by this court in the case of *The Magnolia*, (20 How. 298;) and in the case of the *Philadelphia, Wilmington and Baltimore Co. v. the Philadelphia and Havre de Grace Co.*, (23 How. 215,) it was emphatically said, that since the case of *Waring et al. v. Clark*, (5 How. 464,) the exception of *infra corpus comitatus* is not allowed to prevail. Taken together, these three decisions, we think, ought to be regarded as decisive of the point under consideration, and may well excuse us from any extended argument upon the subject.

3. But it is insisted that the case was not cognizable in the district court for the southern district of New York. Judging from the course of the argument, it would seem that the error on this

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point arises from a misapplication of the established rule, that jurisdiction in the admiralty, in cases of tort, depends upon locality. Whether a wrongful act, committed upon the person or property of another, was of a character to be denominated a marine tort, and, consequently, to be regarded as the proper foundation of a suit cognizable in the admiralty, undoubtedly depends upon the locality where the wrongful act was committed, as already explained. But marine torts are in the nature of trespasses upon the person or upon personal property, and they may be prosecuted *in personam* in any district where the offending party resides, or *in rem* wherever the offending thing is found to be within the jurisdiction of the court issuing the process.

Process *in rem* is founded on a right in the thing, and the \* object of the process is to obtain the thing itself, or [\* 581 ] a satisfaction out of it, for some claim resting on a real or *quasi* proprietary right in it. Consequently, the court, through its process, arrests the thing, and holds possession of it by its officers, as the means of affording such satisfaction, and in contemplation of law it is in the possession of the court itself. Bened't's Adm., p. 241, sec. 439. Unless, therefore, the suit *in rem* can be prosecuted in the district where the property is found, it cannot be prosecuted at all, which would defeat the right of the injured party to a very beneficial remedy. Libels *in rem*, in *instance causes*, civil or maritime, says Mr. Greenleaf, shall state the nature of the cause, as, for example, that it is a cause civil and maritime, of contract, of tort or damage, of salvage, or possession, or otherwise, as the case may be; and if the libel is *in rem*, that the property is *within the district*, and if *in personam*, the names and place of residence of the parties. 3 Greenl. Ev. 401. It is plain that the suit *in rem* cannot be maintained without service of process upon the property, and we hold that it may be prosecuted in any district where the property is found; and such undoubtedly must have been the opinion of this court in *Nelson et al. v. Leland et al.*, (22 How. 48,) which, indeed, is decisive of the point under consideration. See also *Monro v. Almeida*, (10 Wheat. 473.)

It is clear, therefore, on authority, that the third objection to the jurisdiction cannot be sustained; and, after a careful consideration of the evidence, we think the decision of the circuit court was correct upon the merits. Considerable conflict exists in the evidence on the point, whether the lower barge, with the boat of the libelants attached, was or was not on the eastern side of the channel when the collision occurred; but we think the weight of the evidence shows that the tow, as well as the steam-tug, was east of the

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centre of the channel. Full proof was exhibited that the steam-tug was as near the eastern side as it was safe for her to go, and the proof of that fact goes very far to sustain the entire theory of the libelants, especially as all or nearly all the witnesses who were on the several craft composing the tow concur in the statement that \*the propeller made a sheer to the eastward after she passed the steam-tug, and the four boats arranged abreast.

Objections were also made to the computation of the damages, but none of them can be sustained.

One of the objections was, that the court erred in allowing damages for the injury to the cargo as well as to the boat; but the point has been so often ruled that the carrier, who is responsible for the safe custody and due transportation of the goods, may recover in cases of this description, that we do not think it necessary to do more than to express our concurrence in the rule adopted by the circuit court.

The decree of the circuit court is therefore affirmed, with costs.

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SILLIMAN v. THE HUDSON RIVER BRIDGE COMPANY.

COLEMAN v. THE SAME.

1 Black, 582.

DIVIDED COURT AS TO JURISDICTION.

1. Where the judges of the circuit court, after a final hearing in a suit in chancery, certified that they were divided on the question of the jurisdiction of the court over the case, and the judges of the supreme court on the hearing are equally divided on the same question, it must be remitted to the circuit, that the bill may be dismissed, which is the proper course in such case, that the parties may, if they see proper, bring the case here by appeal.
2. The court below also certified a difference as to whether in point of fact the bridge was a nuisance; but this being a question of *fact*, is not one of which this court can take notice on such certification.

This case came here on certificate of division of opinion between the judges of the circuit court for the northern district of New York, on points which are stated in the opinion.

The eight judges of this court being equally divided on the question of jurisdiction certified to, they could only decide what was to be the result in practice in such a case.

*Mr. Beach* and *Mr. Reverdy Johnson*, for complainants.

*Mr. J. V. L. Pruyn*, for defendants.



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\* Mr. Justice NELSON delivered the opinion of the court. [ \* 583 ]

These were suits in equity, in which the bills were filed in October, 1856, to obtain a decree for an injunction perpetually restraining the defendant from erecting a bridge across the Hudson river, at Albany, authorized by an act of the legislature of the State of New York, passed on the 9th day of April, 1856. The defendant answered both bills, to which general replications were filed and proofs taken, and the causes brought on for hearing, and heard together, upon pleadings and proofs.

And upon the hearing of each of the said causes, the following questions occurred, to wit:

First. Whether or not the court, under the constitution and laws of the United States, has the power perpetually to restrain the erection of the bridge across the Hudson river, at Albany, proposed to be erected by the defendants in the manner provided for or authorized by the acts of the legislature of the State of New York, mentioned in the pleadings and proofs herein, in case the plaintiff, being the owner of vessels holding coasting licenses, shows, to the satisfaction of the court, that such bridge, if erected, will materially obstruct, delay, or hinder such vessels in the navigation of said river, while engaged in commerce between said State of New York and other States.

Second. Whether or not the evidence in this case shows that the bridge in controversy will, if erected, constitute a material obstruction and impediment to the navigation of the Hudson river for the vessels of the plaintiff, mentioned in the pleadings and proofs.

Third. Whether or not the defendant is entitled to a decree dismissing the bill, on the ground that the complainant has an \*adequate remedy at law for all injury he may sustain [ \* 584 ] by reason of the erection of the said bridge, should the same be erected as proposed.

On which several questions the opinions of the judges were opposed.

Whereupon, on motion of the defendants, by their counsel, that the points on which the disagreements hath happened may, during the said term, be stated under the direction of the judges, and certified under the seal of the court to the supreme court of the United States, to be finally decided—

It is ordered that the said points of disagreement, together with the pleadings and proofs herein, be, and they hereby are, certified, according to the request of the defendants, as aforesaid, and of the act of congress in that case made and provided.

This court, after hearing the arguments of counsel for the re-

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spective parties. and upon consideration of the first question, are equally divided in opinion, and, consequently, no instructions can be given to the court below concerning it. And, being thus divided on the first question, which involved the jurisdiction of the court below over the subject-matter of the suits, no opinion can be properly expressed upon the two remaining questions. These two questions can become material only, or be inquired into, after jurisdiction has been entertained in the cases, and the court bound to proceed to a final disposition of them.

We may add, also, that the second question is one which, according to a decision of this court, is not properly certified here, the question being one of fact. 8 How. 258.

This being the condition and posture of the cases, it becomes proper and necessary to remit them to the court below, for the purpose of enabling that court to take action upon them, and such further proceedings as the rules of the court or principles of law may require. The rights and interests of both parties call for such a disposition of the cases here; for, as the judges of the court below were divided in opinion upon the question of jurisdiction, when the cases go down, as they must, for final disposition in that [ \* 585 ] court, the bills in the two cases, according \*to the established rule of proceeding, under the circumstances stated, are to be dismissed, and a decree to that effect entered, so that the parties aggrieved may, if they think proper, bring up the questions on appeal for review from the final decree.

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**RICHARD PINDELL, Appellant, v. MULLIKIN and others.**

1 Black, 585.

**PRACTICE IN EQUITY—LIMITATION.**

A decree of the circuit court dismissing a bill, affirmed, because the defendants had been in the peaceable adverse possession of the premises sued for more than twenty years, which is the statute's limitation in Missouri, and also because the evidence does not sustain the bill on the merits.

**APPEAL** from the circuit court for the district of Missouri.

*Mr. Shepley*, for appellees.

No counsel for appellant.

[ \* 586 ] \*Mr. Justice CATRON delivered the opinion of the court.  
Pindell filed his bill against the respondents and others,

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to have decreed to him, as assignee of John R. Sloan, fifty acres of land adjoining the city of St. Louis. The respondents rely on the act of limitations as a defense, (among others,) alleging that they have been in adverse possession of the land for which they are sued for more than twenty years before the suit was brought.

John R. Sloan became of age in 1834; the bill so alleges. The land was confirmed to the father of the respondents, under whom they claim as heirs, by the act of Congress of July 4th, 1836, and the bill was filed in January, 1857, more than twenty years after the legal title was vested by the confirmation.

The bill admits that Mullikin's heirs hold the legal title, and they prove that a division of the land confirmed took place among various owners, and that about ten arpents of it were allotted to Mullikin, the ancestor. This occurred in 1836; that immediately after the partition, Mullikin took possession of the land allotted to him, and he and his heirs have held it in possession ever since.

The claim set up by the bill is barred by twenty years' adverse possession. If, however, this defense was not conclusive \* of the controversy, our opinion is, that no sufficient evidence that the contract alleged to have once existed is proved; and that the decree below dismissing the bill was also proper for want of proof to sustain its allegations.

Decree of the circuit court affirmed.

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WATTS SHERMAN, Plaintiff in Error, v. SMITH.

1 Black, 587.

INDIVIDUAL LIABILITY OF STOCKHOLDERS.

1. A provision inserted in articles of incorporation of a banking company, exempting its stockholders from individual liability, and which is nothing more than the banking law, under which it was organized, provided, receives no additional force as a contract by reason of the article in the incorporation.
2. A reservation in the act under which these articles were framed and accepted, of a right to repeal or modify the act, authorizes a repeal of the individual exemption claim, at least as to debts created after the passage of the repealing act.
3. A statute making the stockholders individually liable for debts created after its passage does not, in such case, impair the obligation of any contract, within the meaning of the federal constitution.

WRIT of error to the supreme court of the State of New York. The case is stated in the opinion.

*Mr. Peck, Mr. Porter, and Mr. John Van Buren, for plaintiff.*

*Mr. John Ganson, for defendants.*

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[ \*590 ] \*Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the supreme court of the State of New York.

The proceeding was instituted under an act of the legislature of the State of New York, to enforce the responsibility of stockholders in certain banking corporations or associations.

The judge before whom the proceedings were instituted declared the bank insolvent, and appointed Smith, the defendant in error, the receiver to take charge of its assets, and to perform such other duties as the law imposed.

The case was afterwards referred to Judge Hall, as a referee, to apportion the debts and liabilities of the bank which had been contracted after the first day of January, 1850, and remained unsatisfied among the stockholders, ratably in proportion to their stock, according to the principles declared by an act passed April 5, 1849, and report to the court. Judge Hall reported that the capital of the bank was \$170,000, and its indebtedness \$502,944 22; and further, that the assets in the hands of the receiver, and an assessment upon the stockholders of an amount equal to the capital of the bank, would be insufficient to discharge its debts and liabilities, and hence apportioned upon each of the stockholders an amount equal to the amount of stock held by them respectively in the bank. The sum of \$7,000 was assessed upon the plaintiff in error.

The referee further reported, that this bank was an association formed 23d April, 1844, under the general banking law of the State, passed 18th April, 1838; and inserted in his report a copy of

the articles of association, among which is one that declares: "The shareholders of this association shall not \*be

[ \*591 ] liable in their individual capacity for any contract, debt, or engagement of the association."

The counsel for the plaintiff in error appeared before the referee and objected to the assessment, on the ground, among others, that the clause in the articles of association above referred to, and which were authorized by the general banking act of 1838, constituted a contract; that the stockholders were not to be made individually liable for the debts of the association, which was protected by the constitution of the United States; and that the provision of the constitution of the State of New York, of 1846, imposing upon them individual liability, and the act of the legislature of 1849 carrying it into effect, were inoperative and void. The counsel further objected, that a reservation by the State, in express terms, of a power to impair by subsequent laws the obligation of contracts

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between individual citizens, lawful at the time it was made, would be in conflict with the federal constitution.

Numerous other objections were taken to the assessment before the referee, but the above are the only ones material to notice in this court.

The referee overruled these objections, and the report was afterwards confirmed by the judge.

This judgment, confirming the report, was appealed from to the supreme court of the State, which affirmed it. An appeal was afterwards taken to the court of appeals, the highest court in the State of New York, in which the judgment in the supreme court was affirmed, and the record remitted to that court to have the judgment carried into execution.

As this case comes before us under the 25th section of the judiciary act, the only question involved is, whether or not the court below erred in denying a right set up by the plaintiff in error under the constitution of the United States; in other words, whether the constitution of the State of New York of 1846, or the act of the legislature of 1849, or both, which subjected the stockholders of the bank to personal liability for its debts accruing after the first day of January, 1850, impaired the obligation of any contract with the stockholders in its charter?

\*The general banking law of 1838, under which this [\* 592] bank was organized, provided in the 23d section, that "no shareholder of any such association shall be liable in his individual capacity for any contract, debt, or engagement of such association, *unless the articles of association by him signed shall have declared that the shareholder shall be liable.*"

The 15th section provided, that "any number of persons may associate to establish offices of discount, deposit, and circulation, upon the terms and conditions, and subject to the liabilities prescribed in this act."

One of the articles of association, as we have already seen, provided, that the shareholders should not be liable in their individual capacities for any contract, debt, &c.

The 32d section of the general banking act provided, that "the legislature may at any time alter or repeal this act."

The argument on the part of the plaintiff is, that this stipulation of the stockholders in the articles of association from exemption from all personal liability for the debts of the institution, constitutes a contract within the authority of the act under which it was organized, that cannot be legally impaired by the provision in the constitution of New York, or by the act of 1849, which seeks to

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change the obligation, and impose upon them personal liability ; that, in respect to this bank, the provision in the constitution and the law are void, as against the constitution of the United States.

Now, in the first place, it is to be observed, that the article of association relied on is but an affirmation of the principle contained in the 23d section of the act of 1838, and can be entitled to no greater effect or operation than the law itself, unless, indeed, by incorporating it into the articles, it can be made permanent or perpetual. The section expressly exempts the individual liability of the stockholder, but confers the privilege upon the association to subject him to personal liability if they think fit. It was competent for the stockholders to avail themselves of this privilege in their articles of association, and thus, perhaps, increase public confidence in the credit of the institution. But we can discover no authority in the section or any necessity or propriety on [ \* 593 ] the part of \*the association, for incorporating the law itself into their articles. Certainly, in so doing they cannot change it, or make it more or less effectual.

In the second place, we remark, that this article of association is not within any authority conferred on the stockholders by any provision of the general banking law.

By the 15th section, any number of persons may associate to establish offices, &c., upon the terms and conditions, and subject to the liabilities, prescribed by the act. These terms and conditions, as it respects the personal liability of the stockholders, are found in the 23d section, which exempts them, unless they see fit to impose it upon themselves. It is not in their power to change the rule of liability except as specified in the section, and that they have not attempted.

This article of association, therefore, being a mere attempt to reenact a provision of the law, and this even without any authority in the general charter, cannot be regarded as a contract in any legal sense of the term, and, of course, not within the protection of the provision of the constitution of the United States.

Another view of this question, even assuming that the stipulation of the stockholders in the article of association amounted to a contract, is equally conclusive against the stockholder.

According to the 15th section, the association was authorized to establish a bank of discount, deposit, and circulation, "upon the terms and conditions, and subject to the liabilities, prescribed in this act." It was not competent for the association to organize their bank upon any other terms or conditions, or subject to any other liabilities, than those prescribed in the general charter. Now,

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the 32d section, which reserved to the legislature the power to alter or repeal the act, by necessary construction, reserved the power to alter or repeal all or any one of these terms and conditions, or rules of liability, prescribed in the act. The articles of association are dependent upon, and become a part of, the law under which the bank was organized, and subject to alteration or repeal, the same as any other part of the general system.

\* The saving clause in the constitution of the State of [\* 594] New York has been referred to, which provided, that “nothing contained in this constitution shall affect *any grants or charters to bodies, politic or corporate, made by this State, or by persons acting under its authority.*” This provision saved the charter of the bank in this case, and all others organized under the general banking law, as well as all those created by special charters, but it saved each of them as a whole, as an entirety; the charters remained after the adoption of the constitution the same as before, with all their privileges and disabilities intact. We do not perceive that this provision has any bearing upon the question in the case.

It is unimportant to inquire into the effect of this provision of the constitution of the State of New York, or of the act of 1849, when applied to the personal liability of the stockholder for debts of the bank existing at the adoption of the one or the passage of the other, as no such question is presented in the case. The constitution imposed the liability only in respect to all debts contracted after the first day of January, 1850, and the act of 1849 simply carries the provision into execution. Neither do we inquire whether or not this constitutional provision applied to existing banks, as that question has been determined by the State court, to which it belonged. Our inquiry has been, assuming this to be the true construction, whether or not any contract in the charter of the bank with the State has been impaired within the meaning of the constitution of the United States, and we are perfectly satisfied that the answer must be in the negative.

Judgment of the State court affirmed.

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WILLIAM GLASGOW and others, Plaintiffs in Error, v. HORTIZ.

1 Black, 595.

MISSOURI LAND TITLES—VILLAGE LOTS.

1. Where a jury finds that a village lot of St. Louis was a common-field lot, and was cultivated and possessed prior to the year 1803, the title so held is, by the act of June 13, 1812, perfect.

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2. That act was a grant *in presenti*; and though provision was made for a survey of the out-boundaries of these common fields, neither the neglect of the surveyor to make it, nor any mistake in it when made, can defeat the title of the holder of the lot under the act of 1812.
3. The map of this survey may be conclusive as between the government and school commissioners or others, but cannot defeat the title of the lot-holder.

WRIT of error to the supreme court of Missouri. The case is stated in the opinion.

*Mr. Bates*, attorney general, for plaintiff.

*Mr. Hill* and *Mr. Polk*, for defendant.

[ \* 599 ] \* Mr. Justice GRIER delivered the opinion of the court.

This case depends upon the solution of a single question, touching the construction of the act of Congress of 13th June, 1812, entitled "An act making further provision for settling the claims to land in the territory of Missouri."

This act declares "that the rights, titles, and claims to town or village lots, out-lots, common-field lots and commons, in, adjoining, and belonging to the several towns and villages, (named in the act, and including St. Louis,) which lots have been inhabited, cultivated; or possessed prior to the 20th of December, 1803, shall be, and they *are hereby, confirmed* to the inhabitants of the respective towns and villages aforesaid, according to their several right or rights in common thereto."

It provides, also, for a survey of the out-boundary lines of the villages, so as to include the common lots and commons thereto respectively belonging, and donates to the town, for the use of schools, all unappropriated pieces of land within such out-boundary.

Surveys were made of the common-fields called the Barrier de Noyer, the St. Louis common, and a portion of the Cul de Sac field, which were claimed by the village or town of St. Louis as early as 1820, when a township plat was returned. But no map had been constructed, which purported to be a compliance with the duty imposed on the surveyor general by act, till the year 1840, when the surveyor general constructed a map, (known in the courts as map X,) exhibiting the out-boundary lines; but for some reason, or by mistake perhaps, the common-fields just mentioned were omitted.

The lots claimed by the several defendants are parts of these excluded common-fields.

The jury have found, in each case, that the lot in question  
[ \* 600 ] \* was a common-field lot of the village of St. Louis; that it was inhabited, cultivated, or possessed prior to the



20th of December, 1803, by the persons under whom the several defendants claim.

Does the admitted fact, that these same commons are not included within the out-boundary map X, affect the titles claimed under the act?

The term common-field is of American invention, and adopted by congress to designate small tracts of ground of a peculiar shape, usually from one to three arpents in front by forty in depth, used by the occupants of the French villages for the purposes of cultivation, and protected from the inroads of cattle by a common fence. The peculiar shape of the lot, its contiguity to others of similar shape, and the purposes to which it was applied, constituted it a common-field lot. It could not be confounded with lots or tracts of land of any other character. Under the Spanish and French authorities, that species of trespassers designated by the American term "*squatter*" was wholly unknown. Villagers did not venture to take possession of lots, either for cultivation or inhabitation, without a formal license from the lieutenant governor.

When congress, in fulfillment of our treaty obligations, came to legislate on the subject of these claims and possessions, they chose to except them from the provisions made by previous enactments, (of 1806 and 1807,) requiring proof of some concession, requête, or survey, under the former government, to be submitted to commissioners to have surveys made, and a favorable report by them, before the claims were confirmed. The claims of these old villages to their common-field lots, and the peculiar customs regarding them, were well known. Congress, therefore, did not require that any documentary evidence should be filed, nor a report of commissioners thereon. A survey was considered unnecessary, because the several boundaries of each claimant of a lot, and the extent of his possession, was already marked by boundaries, well known among themselves. They required no record in the land office, to give validity to the title. The act is certainly not drawn with

\*much regard to technical accuracy. It is without that [\* 601] certainty, as to parties and description of the property granted, which is required in formal conveyances. But a title by statute cannot be thus criticised. It sufficiently describes the lands intended to be granted, and the class of persons to whom it is granted. Besides, it is not a donation, or mere gift, requiring a survey to sever it from other lands of the donor; but, rather, a deed of confirmation to those who are admitted to have just claims. It passes a present title, *proprio vigore*, of the property described to the persons designated; a patent to another afterwards, for any of

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these lands, would be void, because the government had already released all title and claim thereto. If congress could not grant them to another, much less could the arbitrary edict, or imperfect performance of a neglected duty by a ministerial officer, operate to divest a clear title by statute.

The construction of this act of 1812 has been so often before the courts of Missouri and this court, that it would be tedious to refer to the cases. The case of *Guitard v. Stoddard*, (16 How. 508,) need only be cited, as it contains a review of previous decisions.

We there decide, "That the act of 1812 is a present operative grant of all the interest of the United States in the property described in the act; and that the right of the grantee was not dependent on the *factum* of a survey under the Spanish government. That the act makes no requisition for a concession, survey or permission to settle, cultivate, or possess, or for any location by public authority, as the basis of the right, title, or claim upon which its confirmatory provisions operate. No board was appointed to receive evidence, or authenticate titles, or adjust contradictory pretensions. All these questions were left to be decided by the judicial tribunals."

We have decided, also, that notwithstanding the act of 1824 makes it the duty of claimants to proceed within eighteen months to designate their lots, by proving the fact of inhabitation, and their boundaries and extent, &c., so as to enable the surveyor [ \* 602 ] general to distinguish the private from the vacant \* lots, yet that this act imposes no forfeiture for non-compliance. The confirmee, by a compliance, obtained a recognition of his boundaries; but the government did not, by that act, impair the effect of the act of 1812.

Now, it is true that this court have not decided directly as to the effect of this map X upon the title to lots excluded by the out-boundaries there traced; but it was only because the question was not involved in the cases decided, and not from any peculiar difficulty in the question itself; for its decision is but a corollary from the principles already established by this court. If our decision be correct, that no act of the surveyor general was necessary to give validity to the titles confirmed by this act, *a multo fortiori*, it could not operate to defeat them.

The evident purpose and object of this survey of the out-boundary, required by the act, was to distinguish the private from vacant lots, so that the donation of the remnants to the public schools might be ascertained. This duty was neglected by the government officers for twelve years, when the act of 1824 was passed. At this time,

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the fences which surrounded these common-fields, and designated their boundaries, had rotted down, and the boundaries were difficult to ascertain. The act of 1824 was an attempt to remedy this long-neglected duty of the surveyor general. But it was found ineffectual; and after sixteen years more have elapsed, and the lots, whose titles were confirmed by the act of 1812, may have descended to the second or third generations, the surveyor general seems to have waked up to the performance of his duty. It was purely a ministerial function. His neglect could not suspend the vesting of the titles granted, much less his blunders forfeit them. If these verdicts be true, (and we must assume they are,) the surveyor general has never yet performed the task imposed upon him, of making a survey and map of the out-boundary, including out-lots, common-field lots, &c., belonging to the village, now city, of St. Louis.

The map X may be conclusive, as between the government and the schools; but as it was not necessary, even if correct, \*to confirm the titles under which the defendants claim, [\* 603] its want of correctness cannot now be a reason for their forfeiture.

Judgment of the supreme court of Missouri affirmed.

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PETER CONWAY and others, Plaintiffs in Error, v. TAYLOR'S EXECUTOR.

1 Black, 603.

FERRY RIGHTS ACROSS THE OHIO RIVER.

1. By virtue of ownership of the soil on the Kentucky shore of the Ohio river, and grant of a ferry right under the authority of the State of Kentucky, the defendants in error had, under repeated decisions of the highest court of Kentucky, an exclusive ferry right from the city of Newport, in Kentucky, to the opposite shore.
2. This right being invaded by a rival company, with no other license than one from the State of Ohio and a coasting license for their vessel from the United States, was rightfully enjoined by the State court from interference with the rights of defendants.
3. Though the State of Kentucky may not hinder the exercise of the right of ferriage from the Ohio shore, it may give and protect the exclusive right of ferryage from the Kentucky shore.
4. The right of a vessel licensed under the laws of the United States to land at all customary landings on the Ohio river in the usual pursuit of commerce is not and cannot be denied.
5. But the exercise of this right is not inconsistent with an exclusion from the right of using such a vessel in the ordinary business of ferrying goods and passengers across the river between two points for pay.
6. Such an exclusion is no violation of the right of congress to regulate commerce between the States, nor of any right conferred on a vessel under the laws for securing vessels in the coasting trade.

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WRIT of error to the court of appeals of Kentucky. The case is fully stated in the opinion.

*Mr. Stanbery*, for plaintiffs in error.

*Mr. Showacre*, for defendants.

[ \* 622 ] \* Mr. Justice SWAYNE delivered the opinion of the court.

The appellees filed their bill in equity in the circuit court of Campbell county, Kentucky, seeking thereby to enjoin the appellants from invading the ferry rights claimed by them as set forth in their bill, and also praying for an account and a decree against the appellants in respect of the moneys received by them in violation of the alleged rights of the complainants. The appellants answered, proofs were taken, and the case brought to hearing.

The circuit court of Campbell county entered a decree [ \* 623 ] \* against the appellants. They removed the cause to the court of appeals of Kentucky. That court modified the decree of the court below, but also decreed against them. They thereupon brought the cause to this court by a writ of error under the 25th section of the judiciary act of 1789. It is now presented here for adjudication.

The case made by the pleadings and proofs is substantially as follows:

On the 29th of April, 1787, James Taylor, of Virginia, received from that State a patent for 1,500 acres of land lying upon the Ohio and Licking rivers, at the confluence of those streams, and above the mouth of the latter.

In 1792, James Taylor, the patentee, by his agent, Hubbard Taylor, laid out the town of Newport, at the confluence of the two rivers, upon a part of the tract of fifteen hundred acres.

According to the map of the town as surveyed and thus laid out, the lots and streets did not extend to either of the rivers. A strip of land extending to the water line was left between the street, running parallel with and nearest to each river.

In July, 1793, John Bartle applied to the Mason county court for the grant of a ferry from his lot in Newport, on Front street, across the Ohio to Cincinnati. An order was made accordingly, but the appellate court of Kentucky reversed and revoked it on the 15th of May, 1798, upon the ground that it did not appear that his lot extended to the Ohio river.

On the 29th of January, 1794, a ferry was granted to James Taylor of Virginia, by the Mason county court, from his landing in front of Newport, across the Ohio river, with authority to receive

the same fares which were allowed upon transportation from the *opposite shore*. A ferry across the Licking was also granted to him.

On the 20th of August, 1795, a resurvey and plat of the town of Newport was made, by which the eastern limits of the town were extended to "Eastern Row," and the strip of ground between the Ohio river and the northern boundary of the town, and between Licking river and the western boundary of the town, were indorsed, "Common or *esplanade*, to remain common forever." This plat was made by Roberts.

\* On the 14th December, 1795, an act was passed by the [ \* 624 ] legislature of Kentucky incorporating the town of Newport, in conformity with the resurvey and plat of Roberts.

The preamble, and so much of the act as is deemed material in this case, are as follows: "Whereas it is represented to the present general assembly, that one hundred and eighty acres of land, the property of James Taylor, in the county of Campbell, have been laid off into convenient lots and streets, by the said James Taylor, for the purpose of a town, and distinguished by the name of Newport, and it is judged expedient to vest the said land in trustees and establish the town:

"§ 1. *Be it therefore enacted by the general assembly*, That the land comprehending the said town, agreeably to a plat made by John Roberts, be vested in Thomas Kennedy and others, 'who are hereby appointed trustees for the same, except such parts as are hereafter excepted.'

"§ 7. *Be it further enacted*, That such part of said town as lies between the lots and rivers Ohio and Licking, as will appear by a reference to the said plat, shall forever remain for the use and benefit of said town for a common, *reserving to the said James Taylor, and his heirs and assigns, every advantage and privilege which he has not disposed of, or which he would by law be entitled to.*"

The streets and lots exhibited by the Roberts's plat of 1795, as by that of 1792, did not extend to either the Ohio or Licking river.

The disputed ground between the northern boundary of Front street and the Ohio river varies in width according to the inflexions in the line bounding the margin of the river at high-water mark, from five to ten poles; and the distance from high to low-water mark varies from seventeen to two hundred yards, and was not included in the 180 acres laid out for the town. This area is denominated "the *esplanade*."

In 1799, James Taylor, of Virginia, the patentee, conveyed to his son, James Taylor, of Kentucky, this strip of ground, between Front street and the Ohio river, together with the other land a

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jacent to the 180 acres laid out in the plat of the town in 1795, and also the ferry franchise.

[ \* 625 ] \* James Taylor, of Kentucky, from the time of the conveyance by his father to him, in 1799, continued to run the ferry from the ground in front of Newport, on which it was originally established.

In consequence of the passage of the act of 1806, by the legislature of Kentucky, concerning ferries, James Taylor, of Kentucky, applied to the Campbell county court in 1807 for the establishment of the ferry granted to his father ; and the ferry was re-established in his name, and he executed a bond, and continued to run the ferry from almost every part of the ground or esplanade, in front of the town of Newport, from that period to the time of the filing of the bill in this case.

In 1830 the town of Newport applied to the Campbell county court for the grant to said town of a ferry, from the esplanade across the Ohio river to Cincinnati, which application was refused. An appeal was taken to the court of appeals, and at the June term, 1831, the order of the Campbell county court was affirmed.

This case is reported in 6 J. J. Marshall, 134.

James Taylor, of Virginia, and his grantee and son, James Taylor, of Kentucky, continued, therefore, uninterruptedly to run this ferry from 1794 until the commencement of this suit. The proof shows, also, that he constantly exercised acts of ownership over the whole common in front of Newport, and did not permit even the quarrying of stone without his consent ; that he was in the habit of landing his ferry-boats at various points on this common or esplanade from time to time, and that he acquiesced in its free use as a common for egress and ingress by the people of the town, but always claimed and exercised the exclusive ferry privilege.

"After the incorporation of the town of Newport as a city, the city of Newport applied, in 1850, at the February term of the Campbell county court, for the grant of a ferry across the Ohio river, to the president and common council of the city of Newport. No notice was given of the application, and the ferry was granted."

At the time of this application, James Taylor, of Kentucky, \* had departed this life, leaving a will, and appointing his son, James Taylor, his executor, and making a particular devise of this ferry, and requiring his executor to rent it until the taking effect of the devise, as provided in the will.

As soon as the action of the Campbell county court granting a ferry to the city of Newport was known, a writ of error was sued out from the circuit court by the executor and devisees of James

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Taylor, of Kentucky, to reverse the order of the county court, whereby the ferry was granted. The order was reversed. The city of Newport took the case to the court of appeals of Kentucky. That court, in March, 1850, affirmed the judgment of the circuit court. This case is reported in 11 Ben. Monroe, 361.

It appears in the proofs, that the ferry-boats used by the appellees were duly enrolled, inspected, and licensed under the laws of the United States.

No claim is set up in the bill as to any ferry license from Ohio, or to any right of landing on the Ohio side.

In 1853 the appellants built the steamer *Commodore*, and constituted themselves "The Cincinnati and Newport Packet Company," for the purpose of running that steamer as a ferry-boat from Cincinnati to Newport, and from Newport to Cincinnati. They rented, for five years, a portion of the esplanade in front of Monmouth street, *in the city of Newport*, from the common council of that city.

The *Commodore* was a vessel of 128 tons burden, and in all respects well appointed and equipped.

The appellants caused her to be enrolled on the 4th of January, 1854, at the custom house at Cincinnati, under the act of congress for enrolling and licensing vessels to be employed in the coasting trade and fisheries, with Peter Conway as master, and obtained on the same day, from the surveyor of customs at the port of Cincinnati, a license for the employment and carrying of the coasting trade.

They commenced running her as a ferry-boat from Cincinnati to Newport, and from Newport to Cincinnati, on the 5th of January, 1854.

\* Her landings were at the wharves on each side of the [\* 627] river, opposite to each other, the landing in Newport being at the foot of Monmouth street.

The right of the *Commodore* to land there, for all lawful purposes, was not contested in the court of appeals, and was not questioned in the argument here.

In January, 1854, the appellees exhibited their bill in equity against the appellants.

In the same month a preliminary injunction was granted, restraining the appellants from running the *Commodore* as a ferry-boat between the cities of Cincinnati and Newport.

In the progress of the cause, proceedings were instituted against the appellants for contempt of the court in violating this injunction. It was then made to appear that the appellants had, on the

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6th of March, 1854, obtained a ferry license under the laws of Ohio. This fact appears in the record, and is adverted to in the judgment of the court of appeals.

Upon the final hearing, the Campbell circuit court decreed, that an account should be taken of the ferriages received by the appellants on account of the Commodore, and that they "be and they are, each and all of them, perpetually enjoined from landing the boat called in the pleadings and proof the 'Commodore,' or any other boat or vessel, upon that part of the Kentucky shore of the Ohio river lying between the lots of the city of Newport and the Ohio river, designated upon the plat of the town of Newport as the 'esplanade,' and including the whole open space so designated, for the purpose of receiving or landing either persons or property *ferried from, or to be ferried to, the opposite shore of the Ohio river.*

"It being hereby adjudged against all the defendants to this action, that the entire privilege and franchise of ferrying persons and property to and from said part of the Kentucky shore of the Ohio river is in the plaintiffs alone; and it is hereby adjudged, that the receiving of persons, animals, carriages, wagons, carts, drays, or any other kind of vehicle, either loaded or empty, upon said boat or any other vessel at said part of the Kentucky shore, for the purpose of being transported and landed upon the opposite [\* 628] shore of the Ohio river, and \*the landing of persons, animals, and the kind of property above described, which had been received upon said boat or other vessel at or from the opposite shore of the Ohio river, and transported across said river, upon said part of the Kentucky shore, is an infringement of the ferry franchise of the plaintiffs, and is hereby perpetually enjoined; and this injunction shall extend to and embrace all persons claiming under the defendants to this action."

In reviewing this adjudication, the court of appeals held: "The judgment is erroneous in the extent to which it perpetuates the injunction, and to which it restrains the Commodore and the defendants in landing upon the slip in question persons and property transported from the Ohio shore, and in adjudging, as it seems to do, the exclusive right of ferrying from both sides of the river to be in plaintiffs alone. *The transportation as carried on* was illegal and properly enjoined, and the injunction should have been perpetuated against future *transportation of a like kind*, either under color of any license obtained, or to be obtained, from the authorities of the United States under the existing laws, or without such license, unless authorized to transport from the Ohio shore, from a ferry established on that side under the laws of that State; and they



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might have been restrained or prohibited, under all or any circumstances, from transporting persons or property from this to the other side, (within the interdicted distance above or below an established ferry on this side,) unless authorized under the laws of this State to do so; and the exclusive right of ferrying from the Kentucky side should have been declared to be in the plaintiffs.

"Wherefore the judgment perpetuating said injunction, and adjudging the exclusive right of ferrying from both sides of the river to be in the plaintiffs, is reversed, and the cause as to that is remanded, with directions to perpetuate the injunction to the extent just indicated, and to adjudge the right as above directed.

"And afterwards, to wit, on the 9th day of February, 1860, the following order was entered on the records of this court:

"City of Newport v. Taylor's Executors *et al.* Judge Campbell.

\*"It is ordered that the mandate be amended as follows: [ \* 629 ] That the judgment perpetuating the said injunction is *reversed*, and the cause as to that is remanded, with directions to perpetuate the injunction to the extent just indicated, and to adjudge the right, as above directed."

It is objected by the appellants, that no such ferry franchise exists as was sought to be protected by this decree, because it was granted under the laws of Kentucky, and did not embrace a landing on the Ohio shore. It is insisted that such a franchise, when confined to one shore, is a nullity, and that the concurrent action of both States is necessary to give it validity.

Under the laws of Kentucky a ferry franchise is grantable only to riparian owners. The franchise in this instance was granted in pursuance of those laws. Any riparian ownership, or right of landing, or legal sanction of any kind beyond the jurisdiction of that State, is not required by her laws.

The riparian rights of James Taylor, deceased, and of his executor and devisees, in respect of the Kentucky shore, have been held sufficient to sustain a ferry license by the highest legal tribunal of that State, whenever the subject has been presented. The question came under consideration, and was discussed and decided in the year 1831 in 6 J. J. Marshall, 134, *Trustees of Newport v. James Taylor*; in 1850 in Ben. Monroe, 361, *City of Newport v. Taylor's Heirs*; in 1855 in this case, 16 Ben. Monroe, 784; and, finally, in 1858, in the *City of Newport v. Air & Wallace*. (Pamphlet copy of record.)

These adjudications constitute a rule of property and a rule of decision which this court is bound to recognize. Were the question

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an open one, and now presented for the first time for determination, we should have no hesitation in coming to the same conclusion. We do not see how it could have been decided otherwise. This point was not pressed by the counsel for the appellants. The judgments referred to exhaust the subject. We deem it unnecessary to go again over the same ground.

The concurrent action of the two States was not necessary. "A ferry is in respect of the landing place, and not of the [ \* 630 ] \* water. The water may be to one, and the ferry to another." (13 Viner's Ab. 208, A.)

In 11 Wend. 590, *The People v. Babcock*, this same objection was urged, in respect of a license under the laws of New York, for a ferry across the Niagara river. The court said: "The privilege of the license may not be as valuable to the grantee, by not extending across the river; but as far as it does extend, he is entitled to all the provisions of the law, the object of which is to secure the exclusive privilege of maintaining a ferry at a designated place."

The point has been ruled in the same way in a large number of other cases:

2 McLean, 377, *Bowman's Devises and others v. Burnley and others*; 3 Yerger, 390, *Memphis v. Overton*; 1 Green's Iowa Rep. 498, *Phelps v. Bloomington*; 4 Zabriskie, 723, *Freeholders v. The State*; 8 How. 569, *Wills et al. v. St. Clair County et al.*; 16 How. 564, *Fanning v. Gregoire*.

In the case last cited, (*Fanning v. Gregoire*, 16 How. 564,) the arguments on file show that this objection was pressed with learning and ability. In the opinion delivered, the court seems to have assumed the validity of such a license, without in terms adverting to the question. Another question was fully discussed and expressly decided. This point does not appear in the report of the case.

Our attention has been earnestly invited to the following provisions of the ferry laws of Kentucky, under which the license of the appellees was granted:

"None but a resident of Kentucky can hold the grant of a ferry. Sec. 5, Stanton's Revised Statutes, p. 540.

"Any sale or leasing of a ferry right, or contract not to use it, made with the owner of a ferry established on the other side of the Ohio or Mississippi, shall be deemed an abandonment, for which the right shall be revoked. Sec. 12.

"Any one who shall, for reward, transport any person or thing across a water-course from or to any point within one mile of an established ferry, unless it be the owner of an established [ \* 631 ] ferry on the other side of the Ohio and Mississippi \* rivers

so transporting to such point on this side, and any owner or lessee, or servant of the owner of a ferry on the other side of either of those rivers, who shall so transport from this side, without reward, shall forfeit and pay to the owner of the nearest ferry the sum of sixteen dollars for every such offense, recoverable before a justice of the peace. Sec. 14.

"No ferry shall be established on the Ohio river within less than a mile and a half, nor upon any other stream within less than a mile of the place in a straight line, where any existing ferry was pre-established, unless it be a town or city, or where an impassable stream intervenes.

"No new ferry shall be so granted within a city or town, unless those established therein cannot properly do all the business, or unless public convenience greatly requires a new ferry at a site not within four hundred yards of that of any other." Sec. 15.

We have considered these in connection with the other provisions of those laws. Whether they are wise and liberal, or the opposite, are inquiries that lie beyond the sphere of our powers and duties.

Considered all together, they have not seemed to us to deserve the character which has been ascribed to them. While they fence about with stringent safeguards the rights of the holder of the ferry franchise, they do not leave unprotected the rights of the public. If they give the franchise only to the riparian owner and citizen of the State, they surround him with sanctions designed to secure the fulfillment of his obligations.

The franchise is confined to the transit from the shore of the State. The same rights which she claims for herself she concedes to others. She has thrown no obstacle in the way of the transit from the States lying upon the other side of the Ohio and Mississippi. She has left that to be wholly regulated by their ferry laws. We have heard of no hostile legislation, and of no complaints, by any of those States. It was shown in the argument at bar that similar law exists in most, if not all, the States bordering upon those streams. They exist in other States of the Union bounded by navigable waters.

\* Very few adjudged cases have been brought to our [\* 632] notice in which the ferry rights they authorize to be granted have been challenged; none in which they have been held to be invalid.

A ferry franchise is as much property as a rent or any other incorporeal hereditament, or chattels, or realty. It is clothed with the same sanctity and entitled to the same protection as other property.

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"An estate in such a franchise and an estate in land rest upon the same principle." 3 Kent's Com. 459.

Lastly, it is urged that the Commodore, having been enrolled under the laws of the United States, and licensed under those laws for the coasting trade, the decree violates the rights which the enrollment and license gave to the appellants in respect of that trade by obstructing the free navigation of the Ohio.

Here it is necessary to consider the extent of the injunction which the decree directs to be entered by the court below.

The counsel for the appellants insists that, "as respects transportation from the Kentucky side, and from the Commodore's wharf at the foot of Monmouth street, that vessel is enjoined, under '*all or any circumstances, from transporting persons or property*' to the opposite shore, unless under the authority of the State of Kentucky."

We do not so understand the decree. If we did, we should, without hesitation, reverse it. An examination of the context leaves no doubt, in our minds, that the court intended only to enjoin the Commodore, under "all or any circumstances, from transporting persons or property" from the Kentucky shore *in violation of the ferry rights of the appellees*, which it was the purpose of the decree to protect. The bill made no case, and asked nothing, beyond this. The court could not have intended to go beyond the case before it. That the appellants had the right after as before the injunction, in the prosecution of the carrying and coasting trade, and of ordinary commercial navigation, to transport "persons and property" from the Kentucky shore, no one, we apprehend, will deny. The limitation is the line which protects the ferry rights of the appellees.

[ \* 633 ] \* Those rights give them no monopoly, under "all circumstances," of all commercial transportation from the Kentucky shore. They have no right to exclude or restrain those there prosecuting the business of commerce in good faith, without the regularity or purposes of ferry trips, and seeking in nowise to interfere with the enjoyment of their franchise. To suppose that the court of appeals, in the language referred to, intended to lay down the converse of these propositions, would do that distinguished tribunal gross injustice.

The Commodore was run openly and avowedly as a ferry-boat; that was her business. The injunction as to her and her business was correct.

The language of the court must be considered as limited to that subject. The zeal with which this point was pressed by the counsel for the appellants has led us thus fully to consider it.

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The enrollment of the Commodore ascertained her ownership, and gave her a national character.

The license gave her authority to carry on the coasting trade. Together they put the appellants in a position to make the question here to be considered.

The language of the constitution to which this objection refers is as follows: "The congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." Art. 1, § 8, clause 4.

The character and extent of the power thus conferred, and the boundaries which separate that power from the powers of the States touching the same subject, came under discussion in this court, for the first time, in *Gibbons v. Ogden*, (9 Wheat. 1.) It was argued on both sides with exhaustive learning and ability. The judgment of the court was delivered by Chief Justice Marshall. The court said: "They" (State inspection laws) "form a portion of the immense mass of legislation which embraces everything within the territory of a State *not surrendered to the general government*; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and \*those which respect turnpike [ \* 634 ] roads, *ferries*, &c., are parts of this mass."

The proposition thus laid down has not since been questioned in any adjudicated case.

The same principle has been repeatedly affirmed in other cases, both in this and the State courts.

In *Fanning v. Gregoire*, (9 How., 534,) before referred to, this court held:

"The argument that the free navigation of the Mississippi, guarantied by the ordinance of 1787, or any right which may be supposed to arise from the exercise of the commercial power of congress, does not apply in this case. Neither of these interfere with *the police powers of a State* in granting ferry licenses. When navigable rivers within the commercial powers of the Union may be obstructed, one or both of these powers may be invoked."

Rights of commerce give no authority to their possessor to invade the rights of property. He cannot use a bridge, a canal, or a railroad without paying the fixed rate of compensation. He cannot use a warehouse or vehicle of transportation belonging to another without the owner's consent. No more can he invade the ferry franchise of another without authority from the holder. The vital-

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ity of such a franchise lies in its exclusiveness. The moment the right becomes common, the franchise ceases to exist.

We have shown that it is property, and, as such, rests upon the same principle which lies at the foundation of all other property.

Undoubtedly, the States, in conferring ferry rights, may pass laws so infringing the commercial power of the nation that it would be the duty of this court to annul or control them. 13 How. 519, *Wheeling Bridge* case. The function is one of extreme delicacy, and only to be performed where the infraction is clear. The ferry laws in question in this case are not of that character. We find nothing in them transcending the legitimate exercise of the legislative power of the State.

The authorities referred to must be considered as putting the question at rest. The ordinance of 1787 was not particularly brought to our attention in the discussion at bar.

Any argument drawn from that source is sufficiently met by what has been already said.

The counsel for the appellees has invoked the authority of *Cooley v. The Board of Wardens of Philadelphia*, (12 How. 299,) in which a majority of this court held that, upon certain subjects affecting commerce as placed under the guardianship of the constitution of the United States, the States may pass laws which will be operative till congress shall see fit to annul them.

In the view we have taken of this case, we have found it unnecessary to consider that subject.

There has been now nearly three-quarters of a century of practical interpretation of the constitution. During all that time, as before the constitution had its birth, the States have exercised the power to establish and regulate ferries; congress never. We have sought in vain for any act of congress which involves the exercise of this power.

That the authority lies within the scope of "that immense mass" of undelegated powers which "are reserved to the States respectively," we think too clear to admit of doubt.

We place our judgment wholly upon that ground.

There is no error in the decree of the court of appeals. It is, therefore, affirmed, with costs.

DECISIONS  
OF THE  
SUPREME COURT OF THE UNITED STATES,  
DECEMBER TERM, A. D. 1862.

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JUSTICES OF THE COURT

HON. ROGER B. TANEY, CHIEF JUSTICE.  
HON. JAMES M. WAYNE,  
HON. JOHN CATRON,  
HON. SAMUEL NELSON,  
HON. ROBERT C. GRIER,  
HON. NATHAN CLIFFORD,  
HON. NOAH H. SWAYNE.  
HON. SAMUEL F. MILLER,  
HON. DAVID DAVIS,  
EDWARD C. BATES, ATTORNEY GENERAL.  
WILLIAM THOMAS CARROLL, CLERK.  
WARD H. LAMON, MARSHAL.  
JEREMIAH S. BLACK, REPORTER.

ASSOCIATE JUSTICES.

THE UNITED STATES, Appellants, *v.* ANDRES CASTILLERO.  
ANDRES CASTILLERO, Appellant, *v.* THE UNITED STATES.  
2 Black, 17.

CALIFORNIA LAND GRANTS—CLAIM TO A MINE.

The claimants petitioned the board of commissioners, sitting under the act of 1851, for a confirmation of a grant of a mine. This court held:

1. The rules and regulations for grants of land under the colonization laws of 1824 and 1828 were inapplicable to mines, and that no grant of mining lands known to contain mines could be made under those laws.
2. That the laws of Spain concerning the discovery, the denouncement, the measurement or survey, delivery of possession, approval, and recording of a grant of a mine, were in force in Mexico, and a compliance with them was necessary to make a title to a mine.

## The United States v. Castillero.

3. That because there did not exist in the department of California the tribunal to which the jurisdiction of mines belonged, did not excuse the failure of a claimant of a mine from complying with those laws, nor make good his title which wanted this compliance.
4. Such a tribunal existed at the capital of the Mexican republic, and that government had preserved and continued both the jealous supervision and control of mines which had belonged to the government of Spain and its special tribunal for dealing with these matters.
5. By these laws it was not the discovery or denouncement of a mine which gave a vested right in it, but the adjudication, admeasurement, and registration of proceedings which conferred that right.
6. The title set up by claimants to the quicksilver mine now in controversy is fatally defective in all these respects, and for these reasons the claim is rejected.

THESE are cross-appeals from the decree of the district court of northern California in the matter of the claim of Castillero to a mine and ten leagues of land which he claimed under a grant from Mexico.

At the time the case was argued in the supreme court it was supposed to involve a larger moneyed value than any case that had been before the court previously. The record, in volume, corresponded to this estimate of the importance of the case; and the answer of counsel, and the length and ability of their argument, were in just proportion to this estimate.

Four different documentary titles, or copies of titles, were presented and relied on by claimant, and each of these was assailed as false, fraudulent, or forged. Very much of the argument and of the opinions of the court and of the dissenting judges are given up to these questions of controverted fact.

But the judgment of the court, leaving these aside, as will be seen by a reference to page — of the opinion, was based on the total failure of claimant to establish his title to the mine according to the mining laws of Spain and of Mexico.

*Mr. J. S. Black* and *Mr. B. R. Curtis*, for the United States.

*Mr. Charles O' Connor*, *Mr. Reverdy Johnson*, and *Mr. Peachy*, for claimant.

[ \* 144 ] \* Mr. Justice CLIFFORD delivered the opinion of the court  
These are appeals from a decree of the district court of the United States for the northern district of California, brought here under the act of congress of the 3d of March, 1851, entitled "An act to ascertain and settle the private land claims" in that State.

[ \* 145 ] \* Provision was made by the first section of that act for the appointment of commissioners to examine all such



claims, and decide upon their validity; and it was provided by the 8th section of the act, that every person claiming land in that State by virtue of any right or title derived from the Spanish or Mexican governments, should present the same to those commissioners for their adjudication.

Pursuant to that requirement, Andres Castellero, on the 30th day of September, 1852, presented the claim in controversy for adjudication to the board of commissioners constituted under that act, and at the same time submitted certain documentary evidences of title, to show that the claim ought to be confirmed. Among other things, he represented in his petition to the effect that, in the year 1845, he discovered a mine of cinnabar in the then jurisdiction of San José, which is now known as the county of Santa Clara, in the State of California; and that having formed a company for working the mine, he, on the 3d day of December of that year, received from the magistrate of that jurisdiction, in due form, the juridical possession of the mine, and also of certain adjacent land, to the extent of three thousand varas in all directions, averring, in the same connection, that all the facts so alleged would appear by the duly authenticated papers issued from the office of that magistrate, copies of which were submitted with the petition. He also represented, that soon after his discovery, the record of his mining possession, or a testimonio of the same, was submitted to the *Junta de Fomento y Administrativa de Minería*, the highest mining tribunal of Mexico; and that the members of that tribunal, on the 14th day of May, 1846, after an examination of the laws relative thereto, and mature deliberation, declared that the juridical possession so given, although embracing an unusually large extent of land, was in conformity to law, and fully justified by the circumstances of the case, and recommended to the president through the minister of justice, not only that his mining possession should be confirmed, but that two square leagues of land should also be granted to him in fee for the benefit of his mining operations. Petitioner accordingly claimed the two \*leagues of land in fee as well as [\* 146] the mining possession, and in support of the claim to the land, he alleged that the minister of justice, on the 20th day of the same month, informed the *Junta de Fomento* that the president had acceded to the recommendation and granted the land; that on the same day he also notified the minister of relations of the same fact, in order that the proper decree might be issued; and that the minister of relations, on the 23d day of May, 1846, issued his order to the governor of the department, directing him to put the petitioner in the possession of the same two square leagues of land. Referring

to the last dispatch, and assuming it to be a grant, he also alleged in his petition, that on receiving the same, he started to go to that department for the purpose of surveying the land and taking juridical possession of the same, but was interrupted in his journey and prevented from so doing by the operations of the war between the two countries.

Such is the substance of the representations of the petition so far as respects the title of the claimant, but he also alleged that he had ever since continued in possession both of the mine and the land, and that he and those claiming under him had made extensive and expensive improvements on the premises. Claimant presented certain documentary evidences of title before the commissioners which it becomes important to notice, because it was upon those that he relied to show that the prayer of his petition ought to be granted. They consisted of certain proceedings alleged to have taken place before the alcalde of San José Guadalupe in respect to the registry of the mine, and certain subsequent proceedings of the *Junta de Fomento* and other public authorities of the home government, which were introduced as showing a confirmation of the doings of the alcalde in respect to the registry of the mine and an absolute grant of the two square leagues of land.

I. Petitioners in such cases are required by the act of congress not only to present their claims to the commissioners, but also the documentary evidences of title on which they rely to support the [\* 147] same; and in obedience to that requirement the \*claimant presented the documents referred to in his petition, of which the following is a summary:

1. His petition, dated November 22d, 1845, addressed to the alcalde of first nomination, representing that he had discovered a vein of silver with a *ley* of gold on the rancho of José Reyes Berreyesa, which he wished to work in company, and requesting the alcalde, in conformity with the ordinance on mining, to fix up notices in public places of the jurisdiction, in order to make sure of his right when the time for the juridical possession should arrive, according to the laws upon that subject. Immediately following the petition is a certificate signed by Pedro Chabolla, certifying that the petition is a copy of the original to which he refers, and which certificate purports to have been executed on the 13th day of January, 1846, at the pueblo of San José Gaudalupe, and to have been signed in the presence of two assisting witnesses.

2. Claimant also introduced another document purporting to be a supplemental petition to the same alcalde, dated the 3d day of

December, 1845, in which he represented that, in addition to silver with a *ley* of gold, he had, in the presence of several bystanders, taken out liquid quicksilver from the mine, and requested to add that statement to his previous representation in order to secure his right. Both of the petitions purport to have been executed at the mission of Santa Clara, and to have been signed by the claimant. Appended to the supplemental petition, also, is a certificate signed by Pedro Chabolla, which is of the same date and in all respects similar to the one connected with the first petition.

3. Following the last-named petition and certificate is the document filed before the commissioners as the copy of an original then relied on by the claimant as the proper evidence to show that he made due registry of the mine, and that the juridical possession of the same was duly given to him by competent authority in accordance with the regulations of the mining ordinance. Considering the importance of the document, it will be given in full. Unlike what is usual in title papers \*executed by Mexican [ \* 148 ] officials, it has no introductory caption whatever, but the translation reads as follows:

“There being no deputation on mining in the department of California, and this being the only time since the settlement of Upper California that a mine has been worked in conformity with the laws, and there being no *juez de letras*, (professional judge,) in the second district, I, the *alcalde* of first nomination, citizen Antonio Maria Pico, accompanied by two assisting witnesses, have resolved to act in virtue of my office for want of a notary public, there being none, for the purpose of giving juridical possession of the mine known as Santa Clara, in this jurisdiction, situated on the rancho of the retired sergeant José Reyes Berreyesa, for the time having expired which is designated in the ordinance of mining, for citizen Don Andres Castillero to show his right, and also for others to allege a better right, between the time of denouncement and this date, and the mine being found with abundance of metals discovered, the shaft made according to the rules of art, and the working of the mine producing a large quantity of liquid quicksilver, as shown by the specimens which this court has; and as the laws now in force so strongly recommend the protection of an article so necessary for the amalgamation of gold and silver in the republic, I have granted three thousand varas of land in all directions, subject to what the general ordinance of mines may direct, it being worked in company, to which I certify, the witnesses signing with me; this act of possession being attached to the rest of the *espediente*, depos-

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ited in the archives under my charge. This not going on stamped paper, because there is none, as prescribed by law.

"Juzgado of San José Guadalupe, December 30, 1845.

"ANTONIO MARIA PICO.

"Assisting witnesses:

"Antonio Suñol,

"José Noriega."

Annexed to this document, or immediately following it, is a receipt signed by the alcalde, and purporting to have been executed at the same time and place as the principal document, in [ \* 149 ] \* which the signer certifies that he has received \$25 on account of the fees for the possession of the quicksilver mine, named Santa Clara, which is in the jurisdiction under his charge.

4. Connected with the document, appertaining to the proceedings before the alcalde, is another of considerable importance in the investigation, which is dated the 2d of November, 1845, and is denominated in the transcript as the writing of partnership.

Like the preceding petitions, it was executed at the mission of Santa Clara, and by its terms it purports to be a partnership between the claimant and José Castro, Secundino Robles, and Teodoro Robles, and José Maria R. S. del Real, for the working "of a mine of silver, gold, and quicksilver, in the rancho of José Reyes Berreyesa, in the jurisdiction of the pueblo of San José Guadalupe." Article 1 provides to the effect that the claimant, "conforming in all respects to the ordinance of mining, forms a regular perpetual partnership" with the persons before named, adding that "the half of the mine, which is that of which he can dispose, will be divided into three parts"—that is, "four shares to José Castro, four shares to S. and T. Robles, and the other four shares" to the Padre Real, "as a perpetual donation." Parties were restrained by the instrument from alienating their shares; and the provision was, that the expenses should be borne in proportion to the shares. Stipulation was also made that the claimant should have charge of the operations when present, but in his absence they were to be conducted by the Padre Real, and it was also stipulated that the agreement should be authenticated by Manuel Castro, the prefect of the second district. His certificate is appended to the document, in which he certifies, under date of the 8th of December, 1845, that it is a copy of the original, and the certificate purports to have been executed at Santa Clara, in the presence of the alcalde, to whom the petitions were addressed. Congress recognized the existence of war between Mexico and the United States, on the

13th of May, 1846, and it is not denied that the official functions of the Mexican officers in that department entirely ceased as early as the 7th of July in that year. Reference to these dates becomes necessary, \* especially to the latter, because after [ \* 150 ] that time the civil officers in that department during the war were such as were appointed by our military commanders.

5. He also introduced another certificate, which applies to each and all of the foregoing documents. It is signed by James W. Weekes, alcalde of San José Guadalupe, and reads as follows :

“ I certify in due form, that the foregoing is a faithful copy, made to the letter from its original, the ‘ espediente ’ of the mine of Santa Clara, or New Almaden, which exists in the archives under my charge, to which I refer. And in testimony thereof I have signed it this 20th day of January, 1848.”

Four additional certificates are also appended to this espediente, as it has been called in argument at the bar. Of these, the first was executed at San Francisco, and is signed by James Alexander Forbes, British vice-consul, in which he certifies under date of the 21st of January, 1848, that the signature of the last-named alcalde is the true and proper handwriting of the person it represents. None of the other three were executed in California, but respectively bear date at Tepic, in the department of Jalisco. One is signed by Jesus Vejar, a notary public, in which he certifies under date of the 15th of March, 1850, to the effect that the signature of the British vice-consul is genuine. Another is, the signature of the first alcalde at that place, in which he certifies under the same date that the mark and signature of the notary are those he is accustomed to use, and the last is the certificate of the consul of the United States at that place, in which he certifies, under date of the 1st of December, 1850, that “ the signatures attached to the foregoing document are in the true handwriting of the subscribers.”

II. Other documents were also introduced by the claimant as showing a confirmation of the doings of the alcalde in respect to the registry of the mine, and which it is insisted by his counsel establish his right to the two square leagues of land. They do not purport to be originals, but were admitted in evidence as sworn copies of originals, alleged to be on file in the archives of the *Junta de Fomento*, and other departments of the supreme \* government at the capital of the republic. Briefly de- [ \* 151 ] scribed, the documents of this class, introduced before the commissioners, are as follows :

1. Copy of a letter from the claimant, dated at the mission of Santa Clara on the 19th of February, 1846, and addressed to Tomas

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Ramon del Moral, in which he states in effect that he has discovered an abundant deposit of cinnabar, and that he sends with the communication some of the ore and a little quicksilver, that it may be assayed.

2. He also introduced a copy of a letter from J. J. de Herrera, which was addressed to the same person as the preceding letter, in which the writer, under date of the 13th of April, 1846, professes to give certain extracts from two letters received by him at the city of Mexico from the claimant, while the latter was at the mission of Santa Clara. These letters, as described in the copy of the communication given in evidence, were dated on the 19th and 22d of February, in the same year, and the extracts represent the claimant as saying that at the distance of five leagues from the mission to the west he had discovered and denounced a very abundant mine of quicksilver, and that he had sent to his correspondent some of the ore procured from the top of the vein to confirm his statement, together with a little quicksilver which was taken out with the greatest facility.

3. Copies of two communications, showing that the specimens of ore so sent were submitted to the *Junta Facultativa*, and that an assay founded on a mean of the different specimens, gave a "ley" of twenty-five and a half per cent.

4. Copy of a letter or report from the president of the junta to the minister of justice, under date of the 5th of May, 1846, communicating the fact of the reception of the specimens of ore and of the successful result of the assay.

5. Copy of the reply of the minister of justice, dated four days afterwards, in which he states that the president *ad interim* of the republic learns with satisfaction that the claimant has discovered a deposit of quicksilver of excellent quality.

6. Claimant also introduced a copy of a communication signed by him under date of the 12th of May, 1846, addressed to [ \* 152 ] the \*junta for the encouragement and administration of mining, as fully set forth in the transcript.

Referring to his discovery as a mine of quicksilver in the mission of Santa Clara, he states that he has denounced and taken possession, not only of said mine named Santa Clara, but also of an extent of three thousand varas in all directions; that he has formed a company to work it, constructed the pit, and complied with all the conditions prescribed by the ordinance. Intimation is there given that he could easily have secured aid from foreign houses, but that he preferred that the establishment should be entirely national, and for that reason had not hesitated to apply to the junta

for such assistance as he at present needed. His representation was that he only wanted a small advance of \$5,000, on account of the scarcity of coin in that department, and an immediate remittance to the mine of retorts, cylinders, and other small distilling apparatus, and also iron flasks for bottling up the quicksilver. He suggested that he would have proposed a contract of partnership to the junta as an *avio*, or some other agreement, if there had been time to furnish the proofs and details which would be required for such an arrangement, but being obliged to leave the capital within a few days, he found it necessary to restrict himself to "that which appears to present no difficulty and which may open a way to a future agreement." What he desired of the junta was not only that they should accede to his requests as far as they had the power, but that they should send such as they could not grant to the supreme government, recommending their adoption, and with that view he submitted nine propositions, which were as follows:

"*First.* The junta, in the act of approving the agreement, will give me a draft for \$5,000 on some mercantile house in Mazatlan.

"*Second.* On my part, I bind myself to place in said port, within six months after leaving it, fifty quintals of quicksilver, at the rate of \$100 each, which I will send from the first taken out, with absolute preference over every other engagement.

"*Third.* The junta will order that there be placed at my \*disposition before leaving the capital, the eight iron [ \* 153 ] retorts which it has in its office, and all the quicksilver flasks which can be found in the *negociacion* of Tasco, which are fit for use; and, lastly, it will deliver to Señor Don Tomas Ramon del Moral, my attorney, the sums to pay for the retorts, cylinders, and other kinds of small apparatus, which may be ordered to be made for the *negociacion*, to the amount of \$1,000.

"*Fourth.* I will receive the retorts of the junta at cost price, and the flasks which I may select at \$2 apiece, agreeably with their valuation.

"*Fifth.* The ascertained value of said retorts and flasks, and that of the sums which may be delivered to Señor Moral, I will return in the term of one year from this agreement, and also the premium on the draft on Mazatlan, in quicksilver, placed in said port at the price of \$100 the quintal; but if the junta should wish to take one or more 'acciones' in the mine, it shall be left as a part payment of the sum corresponding to one or more 'barras.'

"*Sixth.* While the company is being formed, during the period of one year, counted from the date on which this agreement shall be approved, and the \$5,000 spoken of in the first proposition being

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paid, I will give the preference to the junta in the sale of quicksilver placed in Mazatlan, at the rate of \$100 the quintal.

"*Seventh.* The junta shall represent to the supreme government the necessity of approving the possession which has been given me of the mine by the local authorities of California, in the same terms as those in which I now hold it.

"*Eighth.* It shall also represent the advantage of there being granted to me, as a colonist, two square leagues upon the land of my mining possession, with the object of being able to use the wood for my business.

"*Ninth.* For the compliance of this contract I pledge the mine itself and all its appurtenances."

7. On the 14th of the same month the president of the junta communicated the letter of the claimant, or petition as he calls it, to the minister of justice, and in that communication the mine is described as the quicksilver mine in the mission of Santa [ \* 154 ] \* Clara in the department of California. Claimant also introduced a copy of that communication. Among other things, the writer states that the junta "has no hesitation in recommending the petition" to the favorable consideration of the government; that they, the junta, are of the opinion that the sum of \$5,000 should be advanced to the applicant on the terms proposed, and that they should be authorized to furnish him with such iron retorts and flasks as they had on hand, and to advance him the other \$1,000 asked, which, as they stated, could be employed in the construction of retorts, cylinders, and other small apparatus for the use of the mine.

They also refer to the reasons assigned by the claimant for deferring the formation of a contract of partnership, or *avío*, and state, in effect, that they, the junta, regard it as satisfactory. Reference is also made to that part of the claimant's petition in which he represents that he has denounced and taken possession not only of the mine, but also of an extent of three thousand varas in all directions, and their views upon that subject were, that the possession given by the local authorities was "not in conformance with the ordinance," because it embraced an extent greater than the ordinance allowed, but, notwithstanding that fact, they presented various arguments for the consideration of the department to show that, under the circumstances of the cases, it might be sustained. In respect to the two square leagues of land solicited by the claimant as a colonist, the junta declined to express any opinion for or against the application, for the reason, as stated, that they had no information upon



the subject, and therefore left that matter to be decided by the president as he might think proper.

8. Both the petition of the claimant and the recommendation of the junta were, by the minister of justice, laid before the president, and the former, on the 20th of May, 1846, sent a dispatch to the junta, informing them that the president had been pleased to approve, in all its parts, the agreement made with the claimant, "*in order to commence the working of said mine,*" and that the corresponding communication was made to the minister of relations to issue the proper orders respecting that \* which [ \* 155 ] was contained in the eighth proposition for the grant of lands in that department. Under the same date a decree, so called, was entered by the minister of justice in the margin of the communication received by him from the junta, in the following terms: "Granted in the terms which are proposed, and with respect to the land; let the corresponding order issue to the minister of relations for the proper measures of his office, with the understanding that the government accedes to the petition." Copies of the dispatch of the minister of justice and of the last-named document were also introduced by the claimant.

9. On the same day, the minister of justice sent a dispatch to the minister of relations, informing him of what had been done; in which it is also stated, that the President had acceded to the petition of the claimant, and that the dispatch was transmitted to the end that there might be granted to the claimant, as a colonist, two square leagues upon the land of his mining possession. Copy of that dispatch was also introduced by the claimant.

10. *Finally*, the claimant introduced a copy of a dispatch from the minister of relations to the governor of California, dated on the 23d day of May, 1846, in which the former, after transcribing the dispatch to him from the minister of justice, and incorporating a copy of the same into his own dispatch, as an explanation of the transaction, adds as follows: "And I transcribe it to your excellency, that in conformity with the provisions of the laws and decrees relative to colonization, you may give Señor Castellero possession of the two square leagues above mentioned."

Remark should be made, that in all of the documents introduced as copies of originals on file in the department of the supreme government, the mine is described as one discovered by the claimant in the mission of Santa Clara; and in no one of them is any allusion made to the fact that it was situated on the rancho of José Reyes Berreyesa, as represented in the first petition of the claimant, and

repeated in the act of juridical possession alleged to have been executed by the alcalde.

[ \* 156 ] \* 11. Parol testimony was also introduced by the claimant in support of his claim, both to the mine and to the two square leagues of land, to which some brief reference will be made. He proved by Charles S. Lyman, that he, the witness, made a survey of the land around the mine in the month of February, 1848, at the request of James Alexander Forbes, of California, and Alexander Forbes, of Tepic, in Mexico, who was at the mine at the time of the survey. His orders were to lay out two square leagues; and he states that he was shown a grant, or a copy of a grant, for that quantity from the Mexican government. They requested him to locate the grant so as to cover certain mining rights called "per-tenencia," extending three thousand varas in every direction from the mouth of the mine; and he states that it was so surveyed as to have the mouth of the mine as nearly in the centre as could be without covering land of the neighboring ranchos claimed by individual owners. Field notes of that survey were exhibited, and Fernando Alden, who was also examined by the claimant, testifies that he assisted in making a part of it, and he confirms the testimony of the first witness as to the location of the alleged grant. By his testimony it also appears that he heard of the grant in 1846, when he was in Mexico, and that he was employed by Alexander Forbes, the agent and partner of the claimant, to go to California for the purpose of working the mine, erecting buildings, and occupying the land so granted; and he testifies that he first went to live on the land about the 1st of April, 1847, and continued to reside there until about a year before he gave his testimony, acting as the agent and overseer of the company holding under the claimant. Witnesses were also examined by the claimant to prove that the copy of the act of possession executed by the alcalde, and the other papers included in that expediente, were true copies of the originals, and that the originals were genuine documents. To prove these facts, he called and examined Frank Lewis, deputy recorder for the county of Santa Clara, who, upon being shown a certain paper entitled "Posesion de la mina de St Clara de Año 1845," stated that he obtained it from the office of the recorder of that county.

[ \* 157 ] Having made that statement, the witness was then requested to compare the copies filed in the case with the corresponding parts of that paper; and after having done so, he testified that they were true and exact copies. Two witnesses, Antonio Suñol and José Noriega, who, it will be remembered, were the assisting witnesses to the act of possession executed by the al-

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calde, were also called and examined by the claimant in respect to the authenticity of the supposed original document. They were accordingly requested to examine the same, and having complied with that request, respectively testified that all the signatures, including their own, were genuine. Claimant also called and examined José Maria La Fragua in respect to the class of documents introduced as copies of originals on file in the archives of the supreme government, and his testimony was to the effect that he had compared all those documents with the originals in the city of Mexico, and found them to be correct.

Commissioners, or a majority of them, adjudged that the claim to the mine was valid, and confirmed the mining right or privilege of the claimant, as *pertenencia*, to the extent of three thousand varas in all directions from the mouth of the mine; but they unanimously adjudged the claim to the two square leagues of land to be invalid, and rejected that part of the claim.

Appeal was taken both by the claimant and by the United States to the district court of the United States for the northern district of California.

Much additional documentary evidence was introduced in the district court, and more than one hundred additional witnesses were examined in respect to the matters involved, or supposed to be involved, in the controversy. Parties were fully heard, and on the 18th day of January, 1861, the district court entered a decree confirming the claim to the mine, but diminishing the mining right, or privilege, as compared with the decree of the commissioners, and adjudging the claim to the two square leagues of land to be invalid and rejecting the same. By the terms of the decree, the mining right, or privilege, of the claimant is described and defined as "a piece of land embracing a superficial area, measured on a horizontal plane, equivalent to \*seven *pertenencias*," re- [\* 158] garding each *pertenencia* as a solid of a rectangular base two hundred varas long, of the width established by the ordinance, and in depth extending from and including the surface, to the centre of the earth.

Whereupon both parties appealed to this court. No. 123 is the appeal of the claimant, and No. 133 is a cross-appeal of the United States.

Power to decide upon the validity of any claim presented to land in California, by virtue of any right or title derived from the Spanish or Mexican government, as matter of original jurisdiction, is, by the act of the 3d of March, 1851, exclusively conferred upon the commissioners appointed under the first section of that act. Appel-

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late jurisdiction, however, is conferred upon the respective district courts of the United States for the northern and southern districts of California, and finally upon this court. In deciding upon any such claim, the rule of decision is, as prescribed by the eleventh section of the act, that the court or tribunal making the decision shall be governed by the treaty under which the lands were acquired, the law of nations, the laws, usages, and customs of the government ceding the same, the principles of equity, and the decisions of this court, so far as they are applicable.

III. Enough has already been remarked, in view of those provisions, to show that there are three principal questions involved in the record of very considerable importance.

*First.* Whether the claim of the petitioner to the two square leagues of land, under the rules of decision already mentioned, is shown by the documentary and other evidence to be a valid one within the meaning of the eighth section of the act providing for the adjudication.

*Secondly.* Whether the commissioners had jurisdiction to decide upon the validity of the claim to the mine and mining right, or privilege, as described in the petition, or in other words whether the claim to the mine, together with the pertenencias to the same, as recognized in the mining ordinance, is a claim to land within the meaning of the provisions of the 8th section of that act.

[ \* 159 ] *\* Thirdly.* Whether the claim to the mine, including the mining right or privilege, as set forth in the petition, is shown by the documentary and other evidence to be a valid one under the rules of decision already described.

1. Title to the two square leagues of land, it is insisted, became vested in the claimant by virtue of the documents on file in the department of the supreme government, as evidenced by the copies filed in the case at the time the petition was presented to the commissioners. They consist, it will be remembered, so far as that part of the claim is concerned, of the communications from the claimant to the *Junta de Fomento*, their report or recommendation to the minister of justice, his reply to the same, together with the decree made by him in the margin of their communication, and his dispatch to the minister of relations, and the dispatch of the minister of relations of the 23d of May, 1846, to the governor of the department where the land was situated. Forty witnesses or more, mostly from the city of Mexico, were examined by the claimant to prove the authenticity of those documents, or of the corresponding originals, on file in the archives of the supreme government, and various other proofs, in the form of exhibits, were also introduced

for the same purpose, filling a large space in the transcript, which contains more than three thousand five hundred pages of closely-printed matter.

Such testimony and proofs were regarded as essential, because it was and is insisted by the United States that the documents were fabricated, but in the view we have taken of the case it will not be necessary to decide or consider that question, and consequently neither the testimony of the witnesses or the exhibits on that point will be reproduced. According to the evidence introduced by the claimant, Mariano Parades y Arrillaga, assumed the functions of president *ad interim* of the republic on the 15th day of December, 1845, and the same proofs show that he continued in authority as such until the 29th day of July of the following year, when he surrendered his power, and for a time took command of the army.

Counsel for claimants assume that during that period the \*president was in the exercise of extraordinary powers, [ \* 160 ] and it must be conceded that the evidence is full to that effect, although it may well be doubted whether such of his official acts as were in violation of law have ever been ratified by the Mexican government. Assuming that the president was in the exercise of extraordinary powers on the 23d day of May, 1846, the claimant insists that the dispatch of that date from the minister of relations to the governor of the department of California, especially when it is considered in connection with the marginal decree and dispatch of the minister of justice of the 20th of the same month, is of itself an absolute grant of the two square leagues of land described in his petition.

Conceding the power of the acting president of the republic to make such a grant of the public domain, the question then is one of construction, and in that view of the case it becomes necessary to examine with care so much of the several documents as relate to the claim for the two square leagues of land. Petitioner's representation to the *Junta de Fomento* was that he desired such a grant in order that he might be able to procure sufficient fire-wood for his mining works, and the effect of his request, as stated in his eighth proposition, was that they, the junta, should recommend to the supreme government that there be granted to him, "as a colonist," two square leagues upon the land of his mining possession. When he made that request for a grant as a colonist he evidently referred to the colonization law as containing the authority to comply with his request and make the grant. Those laws had then been in operation for more than twenty years, and consequently he must have expected, even if the government acceded to his peti-

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tion that the grant would be issued in conformity to those laws, and of course must be executed by the governor, subject to the approval of the departmental assembly.

Such also was the view taken of the matter by the junta in their communication to the minister of justice, as plainly appears from the language employed by them in describing his eighth proposition. They refer to it as a petition in which the claimant [ \* 161 ] solicits as a colonist two square leagues of land "upon \* the surface of his mining property for the purpose of supplying himself with the fire-wood necessary for the reduction of the ores," evidently showing that they regarded it as an application under the colonization laws. Nothing is expressed in the decree or memorandum made by the minister of justice in the margin of the communication from the junta which, if rightfully understood, affords any countenance whatever to the views of the claimant. Reliance is placed upon the introductory words, to wit: "Granted on the terms proposed," but it is so obvious from what follows in the same connection, that those words refer to the terms proposed as an arrangement for exploring and operating the mine, that it is difficult to see how any one can be misled in regard to their import. Justification for that remark will be found in the directions immediately given "with respect to the land," which are that the corresponding order be issued to the minister of relations for the proper measures of his office, with the understanding that the supreme government accedes to the petition. Strong doubts are entertained whether the order, "with respect to the land," was intended as anything more than the usual office direction to the corresponding clerk in the department to prepare and put in form a dispatch upon the subject which should express the views embraced in the marginal directions.

Support to that view is certainly derived from the fact that a dispatch was prepared and sent on the same day, which, in its concluding sentence, contains substantially the same language, in the form of a request that the "orders corresponding" may be issued. Other matters, however, are stated in the dispatch which ought not to be overlooked. After stating the fact that he had laid the communication of the junta before the president, he proceeds to say that "His excellency had been pleased to approve, in all respects, the agreement made with the claimant in order to commence the working of said mine," adding that he communicates the information that there may be granted to the claimant, as a colonist, the two square leagues of land, and requesting the minister of relations "to issue orders corresponding." Additional orders,

therefore, were assumed to be necessary, and \*the con- [\* 162] cluding sentence of the dispatch to the minister of relations, written on the same day, and already referred to, shows what kind of orders were contemplated at the time the marginal decree was made. Prepared as those documents were on the same day, they must be considered together, and when so considered, it is clear and beyond doubt, that the marginal decree with respect to the land was not drafted or intended as a grant or any evidence of a grant; for if it had been, the officer who drafted it never would have asked for any order upon the subject from a co-ordinate department of the government.

Request was made by the claimant, in the first place, that a grant might be made to him as a colonist, and it conclusively appears, we think, from an examination of those dispatches, that the Mexican officials who wrote them never for a moment contemplated that the claimant was to have a grant of land in any other mode than by the usual proceedings under the colonization laws. Abundant confirmation of that proposition, if any be needed, is to be found in the dispatch from the minister of relations to the governor of the department, which is the document that the claimant professes to regard as an absolute grant of the land described in his petition. Mexican officials, in their correspondence upon official matters of domestic concern, usually transcribe and incorporate into their own dispatches such communications as they have previously received upon the same subject from other official sources. Such was the course pursued by the minister of relations in his dispatch to the governor of the department. He accordingly transcribed into his dispatch a copy of the one sent to him from the minister of justice, in which is also contained a copy of the before-mentioned communication to the junta, and referring to the entire dispatch, he states in effect, that he transcribed it to the governor in order that he, the governor, in conformity with what is prescribed by the laws and dispositions upon colonization, may put the claimant in possession of the two square leagues of land which are mentioned in the communication. Conformity to the laws and regulations upon the subject of colonization grants is plainly contemplated and required by the directions of that \*dispatch, and conse- [\* 163] quently it is clear that the governor could not put the claimant into the possession of the described tract in any other mode than by the usual proceedings under those laws.

2. Claimant calls this a grant, and it is his privilege to do so if he sees fit; but it is vain for him to expect that this court can give its sanction to any such manifest error. Vacant lands in Calif

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belonged to the supreme government, and the laws for the disposition of the same emanated from that source. (*United States v. Knight*, 1 Black, 242.)

General rules and regulations upon the subject were accordingly ordained, authorizing the governors of territories, under certain specific conditions, to grant such lands to such of the persons therein described as might ask for the same for the purpose of settlement and cultivation. Persons soliciting such lands were required by those rules and regulations to address a petition to the governor, setting forth their names, country, profession, and religion, and also to describe the land asked for as distinctly as possible, by means of a *diseño* or map annexed to the petition. He was not required to prove his representations, but it was made the duty of the governor to obtain the necessary information to enable him to determine whether the case fell within the conditions specified in the regulations, both as regarded the applicant and the land. None of these conditions, of course, were ever complied with, because the proofs show, and it is conceded, that the dispatch was never transmitted to the governor, and that the claimant never returned to that department. Application for a grant was never made under that dispatch, and so far as appears, the governor of the department was never informed that it had been issued. Unless the lands were vacant, such an application would have been fruitless, as the governor had no power to grant any other than vacant lands. Suppose it to be true that the mine is on the rancho of José Reyes Berreyesa, or that of Justos Larios, then the power of the governor to make the grant was entirely wanting; and it would not benefit the claimant if it were now shown that the mine was and is on public

land, because, if his representations are to be credited, [ \* 164 ] he, and all those associated with \* him, fully believed that it was not a part of the public domain. Contrary to this view, it is insisted by the claimant that inasmuch as the president, by whose direction the dispatch was issued and delivered to the party, was in the exercise of all the powers of government, the non-delivery of the dispatch to the governor of the department is wholly immaterial, that the dispatch itself was a decree of concession, and the placing it in the lands of the grantee was a sufficient delivery to vest an equitable title at least in the claimant.

3. Power in the president to make such a grant is not denied by the United States; but the question is, whether he exercised or attempted to exercise any such power, which under the circumstances must depend upon the construction to be given to the dispatch of the minister of relations addressed to the governor of the depart-



ment. Explanations already given show to a demonstration, we think, that such is not the true construction of the dispatch, and consequently the proposition of the claimant cannot be sustained, and in rejecting the proposition as untenable, we place our conclusion upon the ground that the proposition assumes an erroneous construction of the dispatch under consideration, and is based entirely on that assumption.

4. Attempt is made to support the proposition by some of the remarks of this court in the case of *United States v. Castillero*, (23 How. 468,) but it is evident that the construction given to the opinion of the court in that case is quite as erroneous as that given to the dispatch of the minister of relations. Title to the island of Santa Cruz, near the coast of that department, was claimed in that case by virtue of a regular grant from the governor. Such grant it is true had been issued by the governor, under a special dispatch from the minister of the interior, but the statement is nevertheless correct that the claimant held the island under a formal grant which was in the list of grants included in the Jimeno index. Lands of the islands prior to the 20th day of July, 1838, had never been granted by the governor of that department, and the better opinion is that the colonization laws did not confer the power to make such grants. Authority upon that subject was on that day conferred upon the governor in \*connection with [ \* 165 ] the departmental assembly by a general order, as is more fully explained in that opinion. Direction was given to the governor on the same day by a special dispatch that one of the islands, such as the claimant in that case might select, should be assigned to him before they proceeded under the general order. He accordingly selected the island mentioned, and the governor issued title papers to the donee. Objection was made here to the confirmation upon the ground that the grant had never been approved by the departmental assembly, but the court overruled the objection. Absolute directions were given in that case in respect to lands not authorized to be granted under the colonization laws, and the power so conferred had been exercised and the doings of the governor in making the grant acquiesced in for a period of eight years before the jurisdiction of the territory was acquired by the United States. Compare that statement, which is undeniable, with the facts of this case and it is obvious that the supposed analogy utterly fails.

By the terms of the dispatch under consideration the proceedings in this case were directed to be "in conformity with what is prescribed by the laws and dispositions upon colonization," and of course the discretion of the governor and that of the departmental

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assembly were to be exercised in the performance of their respective duties under the obligations imposed by law. Something also remained to be done by the claimant in order to call forth the exercise of that discretion. He must prepare and present his petition describing the land, and he must also prepare and present, if required, a *diseño* or map of the land in order that the governor might have the means of ascertaining whether the tract solicited was vacant and so situated that it might properly be granted to the applicant. No such petition was ever presented, and no action of any kind ever took place upon the subject. But we forbear to pursue the comparison, as it must be obvious, we think, to every unprejudiced mind, that the two cases are in no substantial respect alike. For these reasons we are of the opinion that the claim to the two square leagues of land cannot be sustained.

[ \* 166 ] \*IV. Before entering upon the examination of the questions involving the validity of the title of the claimant to the mine and mining right or privilege claimed by him, it becomes necessary to consider and decide the question whether the commissioners under the act of the 3d of March, 1851, had jurisdiction over such a claim. Counsel for the claimant maintain the affirmative of that question, but the jurisdiction of the commissioners is denied by the counsel of the United States upon several grounds:

1. They insist, in the first place, that the ownership of a mine under the Mexican law was not the ownership of the land in which the mine was situated; that it was simply the ownership of the right to take from the soil the minerals therein to be found, and was recognized as a right, severed from all public and private land which was vested in the sovereign and which did not pass by a grant of the land, and was capable of being acquired only by a title from the sovereign power, wholly distinct from the title to the land.

2. Several of those propositions, if properly restricted and rightly applied, may well be admitted, because when so restricted and applied they are undoubtedly correct. Mines under the Mexican law may be the subject of rightful ownership, distinct from the land as such for agricultural or other ordinary uses. Ownership of a mine, however, as secured under the mining ordinance by registry and juridical possession, does not consist alone in the right to take from the soil the minerals therein to be found, but it also embraces, if necessary to the working of the mine, a right to the exclusive possession and use of the surface of the land for an indefinite period within the boundaries of the *pertenencias* appertaining to the mining right or privilege. Such rights are by law regarded as severed from private land and also from public land when granted by the

usual forms of conveyance for agricultural or other ordinary purposes. Gamboa by Heathfield, p. 132, sec. 5. Rights to a mine not registered can only be acquired from the sovereign power, and it is true, as contended by the United States, that the forms of such a conveyance are wholly distinct from those employed in the ordinary \*process of granting lands. Another branch [\*167] of the same proposition, not yet reproduced, may also be admitted in the same qualified sense. Mining rights under Mexican laws undoubtedly are usually held upon conditions not affecting the title to the land as derived under the ordinary conveyances, and it is also true that such rights may be acquired and held by others besides the owner of the land under the ordinary grants, and that such rights are terminable when by their use the minerals contained in the soil are wholly removed. Granting all this, still the question arises whether a mine, together with the mining right or privilege appertaining to the same, is not land within the meaning of the act of congress under which the commissioners were appointed. Persons claiming lands in California by virtue of *any right* or title derived from the Spanish or Mexican governments are required to present the same to the commissioners for adjudication, and of course the commissioners have jurisdiction to decide upon the validity of all such claims. 9 Stat. at Large, 632.

3. Questions concerning mines and mining rights in Mexico depend in a great measure upon the provisions of the ordinance of the 22d of May, 1783, which, although ordained long before her independence, by the sovereign of the parent country, is still in force and constitutes the principal code of the republic upon that subject. Omitting unimportant words, article 1, of the 5th title, reads as follows: Mines are the property of my royal crown as well by their nature and origin as by their reunion declared by law. Article 2 contains the following provision: Without separating them from the royal patrimony I grant them to my subjects in property and possession in such manner that they may sell them, rent them, pass them by will, either in the way of inheritance or legacy, or in any other manner alienate the right which in the mines belongs to them, on the same terms in which they themselves possess it, and to persons capable of acquiring it. Rockw. on Mines, p. 49; Halleck Coll. 222.

Discoverers of a new mine in which no pit or shaft had been opened might acquire three pertenencias, and if worked in \*company a certain additional number not exceeding seven [\*168] in all. Writers do not exactly agree as to what is a pertenencia, but the better opinion is that it is a square of two

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dred varas, or five hundred and fifty feet. *Prima facie*, the owner of freehold lands, says Bainbridge, is entitled to all the minerals on and underneath the surface with the exception of royal mines, but he admits that the rule just stated is only a presumption of law, and that a mine may form a distinct possession and inheritance by the production of a title distinct from that to the surface. Bainb., p. 4. He also admits that when mines form a distinct inheritance and are not attached to the ownership of the lands in which they are situate, or form a part of a demesne of a manor, a title to them may be acquired or lost in the same manner as to a common estate of freehold. Bainb. p. 31. Property in minerals unsevered from the land, says Collyer, whether held together with or separately from the property in the land, is what the law terms a corporeal hereditament, as distinguished from the mere right to work for them, which is an incorporeal hereditament; and he also says that an estate in minerals is considered an estate in land, and is transferable *only* under the same restrictions, whether conveyed with or without a conveyance of the adjacent soil. P. 1.

4. Courts of justice also have had occasion to assert the same general principles. Plaintiff in ejectment was allowed, in *Turner v. Reynolds*, (23 Penn. R. p. 199,) to recover a coal mine which he had described in his writ as land, although his title was under a conveyance to him, not of the tract of land, but of the coal which was unsevered. Coal and minerals in place are land, say the court in *Caldwell v. Fulton*, (31 Penn. R. 483,) adding in the same connection that it is no longer to be doubted that they are subject to conveyance as such. Minerals beneath the surface of the land, it is held in the same case, may be conveyed by deed, distinct from the right to the surface, and in enforcing that view the court remark that nothing is more common in that State than that the surface right should be in one and the mineral in another, and we have no doubt that the rule there laid down is correct. *Comyn v. Wheatley*, (Cro. Jac. 150.)

[\* 169] \*Regarding the claim to be fully proved as set forth in the petition, which is the proper view to take of the case in determining the question under consideration, we are of the opinion that the objection to the jurisdiction of the commissioners cannot be sustained, and it is accordingly overruled. Rockw. chap. 11, pp. 519-529, 530-532.

V. Having come to that conclusion, it becomes the duty of this court to examine the third question presented for decision, which is, whether the claim to the mine, including the mining right or

privilege as set forth in the petition, is shown by the evidence to be a valid one within the rules of decision already described.

1. Property in mines not discovered, and registered according to law, whether the mine was on public or private lands, was vested, as has already appeared, exclusively in the supreme government, so that private persons could not acquire it or any interest in it in any other mode than that prescribed in the provisions of the mining ordinance. Reference therefore must be made to those provisions to ascertain what they are and what the discoverer is required to do in order to acquire such a property. Persons discovering one or more mineral hills absolutely new, in which there is no mine or trial pit open, may, under article 1, title 6, of the ordinance, acquire, in the principal vein which they may select, three *pertenencias*, continuous or interrupted, according to certain prescribed measurements, and if they have discovered more than one vein they may have one *pertenencia* for each, to be determined and marked out within the term of ten days. Halleck Coll. p. 223, title 6, art. 1.

Discoverer of a new vein in a hill known and worked in other parts may have in it two *pertenencias*, provided he specifies them within ten days, as mentioned in the preceding article; p. 223, art. 2. Article 3 provides that he who asks for a new mine in a vein known and worked in other places shall not be a discoverer. Such persons as are described in the preceding articles who desire to secure the benefit of those provisions are required by article 4 of the same title to present themselves with a written statement before the mining deputation of that \*territory or the [\* 170] nearest one, should there be none there, stating in it their names and those of their partners, if they have any, the place of their birth, their residence, profession, and employment, and the most particular and distinguishing feature of the place, hill or vein, of which they ask adjudication; all of which circumstances and the hour in which the discoverer presents himself shall be noted in a book of registry, which the mining deputation and notary, if there be one, shall keep, and this being done, his written statement shall be returned to him attested for his due security. Notices are then to be affixed to the doors of the church, the government houses, and other public places of the town for due information, and the command is that the discoverer within ninety days shall make or cause to be made in the vein or veins of his registry a pit or well (*pozo*) of one and a half *varas* in diameter at its mouth and ten *varas* deep, and that as soon as this shall be done, one of the deputies shall personally go, accompanied by the notary, if there be one

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and if there be none, by two assisting witnesses, and by the professional mining expert of that department, to inspect the course and direction of the vein, its width, its dip or inclination to the horizon, called *lay or slope*, its hardness or softness, the greater or lesser solidity of its sides, and the kind or principal indications of the mineral, taking an exact account of all this in order that it may be added to the corresponding part of his registry, with the evidence of possession, which shall immediately be given to him in the name of the sovereign measuring to the party his *pertenencias*, and causing him, as required in the subsequent directions of the ordinance, to fix stakes in his boundaries. Following these regulations, and as the conclusion of the article in which they are contained, it is ordained to the effect that when all this is done "there will be delivered to him an attested copy of the proceedings as a corresponding title."

Contestants appearing during the ninety days may prefer a counter claim, and in that event it becomes the duty of the tribunal to adjudge the right to him who shall make the better proof, [ \* 171 ] but no one shall have any right to be heard unless he\* shall appear within that time. Halleck Coll. p. 224, arts. 4 and 5.

Strict compliance with the law is required, as appears by all the writers upon the subject, and the 13th article, of title 19, provides in effect that the regulations shall be executed with the greatest exactness, precisely as they are written and intended. Halleck Coll. p. 307; Rockw. p. 110; Thompson on Mines, 183.

Properly speaking, says Gamboa, the register is the book in which deeds and grants are entered for perpetual remembrance thereof, so that if they be lost, torn, or defaced, or if any question be raised as to their identity or authenticity, recourse may be had to such book. Registry, says the same author, is the basis of a title to a mine, and the attributive cause of the subject's right of property in it; the crown having subjected the proprietor to this obligation when he made the mines common, so that "no mine can be lawfully worked until registry is made, without which it is liable to be registered by any other person; the form of the ordinance not having been complied with." Although that commentary was written before the date of the ordinance which must furnish the guide in this case, still the views of the writer have an important bearing upon the questions presented, as showing the universality of the rule, that not even the discoverer can acquire any title to a mine without registry. Gamboa, pp. 143, 145.

2. Petition in this case was presented to the commissioners on

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the 30th day of September, 1852, and on the 8th day of January, 1856, their decree was made, confirming the claim to the mine and to the entire mining right or privilege as therein set forth. When the petition was filed, the claimant, as required by law, also presented the documentary evidences of title on which he relied to show that the claim ought to be confirmed. Throughout the whole period that the case was pending before the commissioners, those documents appear to have remained on file as the foundation of the claim, and were finally urged upon the consideration of that tribunal as true copies of originals existing in the office of the magistrate before whom they \*purported to have been [\* 172] executed. Final adjudication was made by the commissioners and the claim confirmed upon that ground, and so far as appears, without the slightest suspicion that the copies filed in the case as documentary evidence under the act of congress were not true copies of originals on file as alleged, or that the originals did not import absolute verity. They of course regarded the documents as authentic, and considering how fully they are attested by official certificates, and that all of the signatures were thoroughly proved by the positive testimony of two witnesses, it is difficult to see how they could have come to any different conclusion, especially as there was no opposing evidence in the case. Additional testimony, however, of a very important character was taken upon the subject in the district court while the case was pending there, and it now becomes the duty of this court to decide the question upon a very different state of facts. Other parties it seems, besides the petitioner, are interested in this claim, and in order that the evidence may be understood, and the testimony of the witnesses properly appreciated, it becomes necessary to advert to the circumstances under which some of these parties acquired their supposed title.

According to the testimony, the mine is within the county of Santa Clara, and is situated in a spur of the Sierra Azul or Blue Mountain, some sixteen or seventeen hundred feet above the level of the sea, and fifteen miles southwardly from the city of San José. Discovery of mineral there was first made by the Indians at a very early period, and they were accustomed to obtain the mineral and use it for paint. Civilized men also had knowledge of the mineral and of the location of the mine more than twenty years before the discovery made by the claimant, but it nowhere appears that any one had discovered that the mineral contained quicksilver. Two persons, Antonio Suñol and Louis Chaboya erected a mill on a stream in that neighborhood some time during the year 1824, and tried to get silver out of the mineral. People generally knew that ther

a mine there, but they did not know what kind of a mineral it contained. By authority of the government the claimant, in [ \* 173 ] the \*autumn of 1845, made a journey to the fort of John A. Sutter, to negotiate with the proprietor for its purchase. Proceeding from Monterey, he and his party, consisting of José Castro and four others, besides a guard of some twenty soldiers, traveled on the route leading through Santa Clara, and his testimony shows that when near that place this mine was mentioned by his principal companion. While there, some of the specimens of the ore were shown to him, and one of the witnesses testified that he visited the mine. Some examination of the mineral was made by him at that time, but he presently left and pursued his journey to Sutter's fort, where he arrived on the 11th day of November, 1845. Remaining there but a short time, he then returned to Santa Clara, where he pursued his investigations by certain rude experiments, and discovered that the mineral contained quicksilver. His first step, as alleged, was to form a partnership for working the mine. Such an instrument bearing date the 2d day of November, 1845, is one of the documents which was filed with the petition. Original interests in mines are usually acquired under a division of the mine into twenty-four parts, called *barras* or shares, and by reference to the instrument of partnership it will be seen that it was framed upon that principle. Four shares were assigned to José Castro, four shares to S. and T. Robles, four shares to the Padre Real, and twelve shares were retained by the claimant. They commenced working the mine in a small way, and the claimant remained there until some time in the month of March or April following, when he left for the city of Mexico and never returned to that department. Affairs of the mine were left, at least for a time, in hands of the Padre Real.

On the 13th day of January, 1846, James Alexander Forbes, British vice-consul for California, wrote to Eustace Barron, of the firm of Barron, Forbes & Co., at Tepic, that the claimant was working a quicksilver mine near the mission of Santa Clara. Alexander Forbes of the same firm and British vice-consul at Tepic, on the 15th day of April, 1846, wrote to J. A. Forbes requesting the former to furnish him as correct information as possible respecting the quicksilver mine mentioned in his [ \* 174 ] preceding letter. Possession of the mine was, prior to the 22d day of September, 1846, delivered to James Alexander Forbes by the Padre Real, the agent of the claimant, as appears by the fact that on that day he wrote to Alexander Forbes, of Tepic, that he was in charge of the mine and was about making a bargain for four shares.



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Two shares were purchased by James A. Forbes of S. & T. Robles about the time he took possession of the mine. Arrangements were made with equal activity by Alexander Forbes to get control of the same property. On the 24th day of November of the same year he instructed his agent in the city of Mexico to purchase shares for him of the claimant, and on the 28th day of the same month he concluded with the agent of José Castro a contract for a lease or avio of the mine for the term of sixteen years, which term is not yet expired. His agent purchased five shares for him in the city of Mexico, and other shares were also purchased by James A. Forbes. Shares were also purchased by Robert Walkinshaw and other parties in the city of Mexico and elsewhere. Most or all of the deeds of conveyance, whether executed by the claimant, Castro, the Messrs. Robles, or the Padre Real, refer to the writing of partnership as the foundation of the title, and none of them make any reference whatever for any purpose to the supposed act of registry, or to the act of juridical possession supposed to have been executed by the alcalde of San José Guadalupe.

3. Appeal was taken by the United States to the district court on the 15th of April, 1856, and from that time to the date of the final decree the case was pending in that court. Reasons for the appeal, as assigned by the United States, are that the claim is invalid, and that is the principal question that remains to be considered. Written notice was served upon the claimant by the district attorney of the United States on the 18th day of August, 1856, to produce the original paper of which exhibit A is a copy, to be used in the examination of witnesses. Exhibit A comprises the documents filed with the petition as copies of originals on file in the proper office of the alcalde. Claimant accordingly produced the document which is the one denominated Exhibit R, No. 2, in the record.

Recurring to the \* document it will be seen that while it [ \* 175 ] has all the certificates appended to it which are described in the copies filed with the petition, still it shows to a demonstration that the copies were neither faithful nor to the letter, as was well said by the district judge when his attention was first called to the subject. Certificate of James W. Weekes is one of the number of certificates appended to the document. When produced it was shown to him while he was under examination as a witness, and upon being asked whether he had ever seen the paper before, he answered that he had, and that the signature to the certificate was his signature. At first he seemed to suppose that it was a copy of what remained in the archives at that time, but immediately stated that he himself recorded it in the book of registry, and that he

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received the document which he so recorded from James Alexander Forbes. He was appointed alcalde in 1848, and he expressly states that the person before named brought the paper to him and requested him to record it, and that he did so while he was alcalde. Original document was presented to the witness, as he states, by J. A. Forbes, and the copy was also made by him, showing that the witness not only made the record without any other knowledge of the paper than what he received from his employer, but that he also signed the certificate certifying that it was "a faithful copy made to the letter from its original," without ever having compared it with the paper presented, and when in point of fact it was not a true copy. Examination of James W. Weekes took place on the 18th of August, 1857, and on the 14th of December, in the same year, James Alexander Forbes was also examined by the United States upon the same subject. His testimony fully confirmed the statements of James W. Weekes that the copy was made on the 20th day of January, 1848, and that the certificate of the alcalde, as well as the body of the instrument, were in his own handwriting, showing that all the alcalde had to do in the matter was to affix his signature to a paper already prepared. Witness last named thinks he prepared the copy at the mine; and he states positively that he obtained the paper which he used as the original from Alexander Forbes who [ \* 176 ] was then at \*the mine. Pressed to explain where he got certain words appearing on the first page of the document, he frankly admitted that he did not know, and finally stated that he copied the paper that was handed to him by his namesake and associate in that business. Attempts were made to impeach this witness, but his material statements are so fully confirmed that it is unnecessary to reproduce the evidence in that behalf. Unmistakable proof therefore is exhibited that the adjudication of the commissioners was based upon documents which were fabricated, and it follows as a necessary consequence that the claimant, when he filed his petition, did not comply with the provision of law which required him to present to the commissioners the documentary evidences relied on by him in support of his claim. Those papers, strictly speaking, are denominated the registry, the act of juridical possession, and the writing of partnership, but the counsel at the bar have treated the entire document as an *espediente*, and as that is a convenient designation, it will be adopted in this investigation.

4. *Espediente* No. 1, called by the attorney general the Weekes' *espediente*, must be rejected as invalid. Certain characteristics of the paper, however, should be noted in addition to those already mentioned, in order that the other documents subsequently intro-

duced may be compared with it as a test of their verity. Caption and indorsement as translated are "year 1845. Espediente of the denouncement, possession, and partnership of the quicksilver mine called Santa Clara, jurisdiction San José Gaudalupe, in Upper California." Contents are: 1. Petition of claimant announcing the discovery of a silver mine with ley of gold. 2. Supplementary petition stating that besides silver and gold he had taken out liquid quicksilver. 3. Act of possession signed by Antonio M. Pico. 4. Receipt of same for fees, amounting to \$25. 5. Writing of partnership. Date of act of possession is Juzgado of San José Gaudalupe, December 30, 1845. Articles of partnership are for a mine of silver, gold and quicksilver, and are dated on the 2d day of November, 1845, some twenty-five days before quicksilver was discovered.

Noting these characteristics as proper to be considered in \*connection with those previously mentioned, we dismiss [ \* 177 ] the document as wholly unworthy of credit.

5. Second espediente, called the Fernandez espediente by the attorney-general, is the one introduced by the claimant on the 6th day of November, 1857, when José Fernandez was examined a second time as a witness. His first examination was on the 28th day of March, 1855, while the case was pending before the commissioners. No such espediente was exhibited then, and no inquiries were made of the witness upon the subject. Request was made of the witness on this last occasion to look at the document shown him by the claimant and say whether he knew in whose handwriting it was, and whether the signatures of Pedro Chabolla or Chaboya appearing thereon were genuine. Answer of witness was, that the document was in the handwriting of Salvio Pacheco, and that the respective signatures of Chabolla were genuine. Other documents were then shown to the witness, and upon being asked whether the signatures were genuine, his answer was in the affirmative. Those documents are as follows: 1. Petition of José Castro, dated the 27th day of June, 1846, addressed to the alcalde of first nomination of the pueblo of San José de Gaudalupe, in which, among other things, he solicits three pertenencias for himself and associates in addition to those previously conceded, and requests that the petition may be attached to the former espediente. Margin of that paper contains an order signed Pacheco, and dated pueblo of San José Gaudalupe, June 29th, 1846, as follows: Let this be included and archived as the party requests. 2. Claimant's two petitions in respect to the registry of the mine. 3. Alcalde's act of possession, which is dated Juzgado de San José Gaudalupe, December, —, 1845. Signatures to the act of possession are Antonio Ma. Pico

with Antonio Suñol and José Noriega as assisting witnesses. Separate certificates of Pedro Chaboya are appended to each of those papers. Three of the certificates are without date, but the one appended to the act of possession is dated on the 13th day of August, 1846. Writing of partnership, so called, is wanting in the expediente, which came from the hands of the claimant. Al-  
[ \* 178 ] though Pedro Chabolla was \*examined as a witness by the claimant, still no questions were asked him respecting this document. Testimony of Salvio Pacheco shows that the whole body of the instrument is in his handwriting, but he omits to state from what he copied it, and fails to give any explanation upon that subject. He says he is acquainted with the signature of Pedro Chaboya, and that his signatures to his certificates are genuine, but he did not see him sign his name, and does not state how he became acquainted with his handwriting. Signer of the certificate testifies that he could not write, that he could only "paint his name," and that it was with great difficulty that he could read any kind of writing. Caption of the document is No. 1, and it is endorsed "Diligencias en el Registro," which signify that it should be promptly registered. Receipt of Antonio Ma. Pico, as shown on expediente No. 1, is wholly wanting in this document. Considering that the signer of the certificates could not write or read writing, and has not been called as a witness to verify the document, it is entitled to very little consideration. Circumstances, however, will render it necessary to recur to this paper again after referring to certain other documents introduced by the claimant.

6. Expediente No. 3, called by the attorney general the Halleck expediente, is endorsed as filed in the case, on the 30th day of January, 1858, but it is certain that testimony respecting it was introduced at an earlier date. Deputy recorder of Santa Clara county was examined by the United States in respect to a similar paper on the 18th day of August, 1857, but insisting upon his right to retain the document, a traced copy of it was made, and on the twenty-ninth day of the same month, the copy was filed in the case by the United States. On the 23d day of October following, another deputy recorder of that county was examined by the claimant in respect to the same or a similar document. Exhibiting a document, entitled "Posesion de la mina St<sup>a</sup>. Clara, año de 1845," he stated that he obtained it from the office of the recorder. Inquiry was made of him when he went into that office, and whether he did not, in 1852, see there the document produced. His answers were  
[ \* 179 ] that he had the entire charge of \*the office from the fall of 1852 to the summer of 1853, but that he had no recol-

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lection of seeing the document there during the first year. Explanations were then given by the witness, in which he stated that the first recollection he had of the document was a few days before the date of the filing on the back of the paper, which is as follows: "Filed February 25th, A. D. 1853, at 12 o'clock a. m. J. M. Murphy, recorder, by S. C. Houghton, deputy," who is the witness; and he goes on to say that just previous to that time, James A. Forbes called at the office of the recorder, and after describing the paper, desired to see the record of it. Search was accordingly made by the witness, but he could find none such there, although he says that he and the applicant searched for it more than a day. What the party was looking for, says the witness, was the record of the paper, and not the paper itself, but they could find nothing of the kind, although the search was thorough and faithful.

Unsuccessful though they were at that time, still the desired document, in the course of a few days, was found there without any further search; for the witness states that some days after that, he found the paper in the office, either in the top of his desk or one of its pigeon-holes, and he says that he was surprised that it should be there without his knowing it, but having found it, he kept it safely until the party who inquired for it came, and it was then filed at his request. Attention is called by the claimant to the fact that there was written in pencil on the back of the paper, as follows: "Filed 3 o'clock p. m., 18 January, 1851. J. T. Richardson, Recorder, S. C. C.," but in view of the circumstances which surround the paper the fact referred to cannot have much weight. Pencil marks could be added to the filing quite as easy as the paper itself could be foisted into the pigeon-holes in the desk of the recorder. Interrogatories were also propounded to H. W. Halleck in respect to that document, and the time when it was deposited in the office of the recorder of Santa Clara county.

Speaking of the document, the witness said he thought it to be the one taken by the mayor, "in my presence," from his office, and transferred to the office of the county recorder in the \* winter of 1851, during the session of the legislature, and [ \* 180 ] he thought in the month of January of that year.

Recollection of witness is that he first went to the office of the recorder for a copy of the papers connected with the mine, but was told that the greater portion of the old alcalde papers were in the office of the mayor. Learning that fact, he went to the latter office, where, on overhauling certain old papers in an old desk, he found this one among them. Witness, as he states, only remembers the papers he found there from the general subject-matter of its con-

tents, as purporting to be an original paper, containing the denouncement and juridical possession of the mine. Document embracing a copy of espediente, number one, was shown to the witness, and he was asked whether it was not a copy of the one he found in the office of the mayor, to which he answered, that he could not remember whether it contained the same papers as that, more or less. Obviously the recollections of the witness upon the subject are very imperfect and indistinct, and consequently his statements are so qualified and so far short of positive declarations that they can hardly be regarded as evidence. Indistinct, however, as the recollections of the witness are, still it is evident that he regards the paper as the original denouncement and juridical possession of the mine, because he says so in answer to the direct interrogatory put to him by the United States, but his opinion in that behalf cannot be regarded as satisfactory proof of the fact, especially when considered in connection with his previous answers as to his means of knowledge and the state of his recollections.

7. Those interested in the mine could not have believed on the 13th day of December, 1850, that any such original document, or duly authenticated copy thereof, was in the State of California, as is evident from the affidavit of their counsel, signed and sworn to on that day. Suit had been commenced in the county court, by the widow and heirs of José Reyes Berreyesa, against all of the persons in possession of the mine, to recover possession of a certain tract of land, including that in which the mine was situated. Defendants were Isidoro de la Torre, of Mazatlan; Alexander Forbes, [\* 181] William Barron, and Eustacho Barron, of Tepic; \* John Parrot, of San Francisco; and James A. Forbes, and Robert Walkinshaw, of the county of Santa Clara. Court granted a rule on the 13th of September, 1850, requiring defendants to produce "certain papers or copies thereof," to be used in the trial of that cause. Among those specified in the motion were certain papers of a pretended denouncement of the mine in 1845. Papers were not produced, and the affidavit of the counsel was filed to support a motion for a continuance. Affidavit stated to the effect that the original denouncement of the mine of New Almaden, and the act of juridical possession given of the same in the year 1845, were held by parties in Mexico, which had not then been received, although the defendants had exercised all due diligence to procure and produce them.

Referring to the contents of this espediente, it will be seen that it contains: 1. Petition of José Castro, already described. 2. Petition of claimant. 3. Alcalde's act of possession.

None of the certificates exhibited in the other espedientes are to be found in this document. Testimony was adduced to show that the several papers were genuine, and the witnesses most relied on for that purpose were José Castro, Antonio Ma. Pico, together with Antonio Suñol and José Noriega, the two assisting witnesses to the act of possession. Full proof was exhibited that no one of the papers was written by the person or persons who signed it, and it was satisfactorily shown that each paper was in a handwriting different from all the rest. Satisfactory proof also was exhibited that the petition of José Castro was in the handwriting of Benito Diaz, and he testified that he wrote it five or six months after our conquest of that department. Writing of partnership, and the receipt of Pico for his fees are both wanting in this document. Caption of the document is: "Posesion de la mina de Sta. Clara, año de 1845," and the act of possession is dated Juzgado de San José Guadalupe, December —, 1845.

8. Two inventories, purporting to contain a list of documents in the Juzgado of San José, were also introduced. Included in the schedule of the first one, which is dated on the 2d day of January 1846, is the following: posesion de la mina de Sta. Clara, a D. Andres Castillero; but the second, which [\* 182] is dated on the 10th day of November of the same year, shows no trace of any such paper. Testimony of H. C. Melone should also be noticed in this connection, as he was the first clerk of the alcalde's court, under our military occupation. His statement is, that he never saw the document or heard it spoken of, although he had occasion to examine the papers there, one by one, in order to select such as should go to the office of the recorder from such as he was required to keep as county clerk.

9. Fourth espediente is the one called the Walkinshaw espediente by the attorney general, and is the last of the series introduced by the claimant, as the documentary evidences of his title to the mine and mining right, or privilege described in his petition. Contents of the espediente are as follows: 1. Petitions of the claimant, as in the first espediente. Appended to each is also a certificate of Pedro Chabolla, dated the 13th of January, 1846, certifying that the petitions respectively were copies of originals, and each certificate purports to have been signed in the presence of P. Sansevan and José Suñol, as assisting witnesses. 3. Pico's receipt for twenty-five dollars as fees. Introductory part of the receipt corresponds to that in the first espediente, but he also describes the mine as one "*in lands pertaining to Don José Reyes Berreyesa.*" Castro's petition and the writing of partnership are both wanting.

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and there is no certificate of Pedro Chabolla appended to the act of possession or any certificate of any kind. Another peculiarity of this document consists in its caption, and as that part of the paper is of considerable importance in the investigation, it will be given without abbreviation. It is as follows:

“YEAR 1845.

“*Espediente of the Denouncement, Possession, and Partnership of the Quicksilver mine called Santa Clara—Jurisdiction of San José Guadalupe, in Upper California.*

“November 22, 1845.—Don Andres Castellero makes the denouncement of the aforesaid, in the pueblo of San José Guadalupe, for want of deputation of mining and judge *de letras*.

[ \* 183 ] \* “December 3, 1845.—Writing which the said Castellero presented, testifying to have taken out quicksilver and other metals, asking that it be annexed to the espediente.

“December 30, 1845.—Act of possession, which, with the assisting witnesses, the alcalde of the pueblo of San Jose gave to Don Andres Castellero, of the mine of Santa Clara, because of the time of the notices being completed.

“December 30, 1845.—Receipt for the fees of the possession, signed by the judge of San José.

“December 8, 1845.—Writing of partnership for the works of the mine, authorized by the prefect of the 2d district.”

Partnership of the quicksilver mine is one of the matters enumerated in the title of the caption, and the writing of partnership is one of the documents circumstantially described in the last article of the same. Espediente produced contains no such paper, and the inference is a very strong one that it has been spoliated by some one having an interest to suppress the missing paper. Description of the paper, as exhibited in the last article of the caption, gives the date as of the 8th day of December, 1845, which is a very material variation from the other copies presented in this record. Discovery that the mineral contained quicksilver, notwithstanding what is stated in the articles of partnership, was not made until late in November, 1845, after the claimant returned from Sutter's Fort. Articles of partnership, as exhibited in the first espediente, were dated before the quicksilver was discovered, and yet the discovery, as set forth in that document, was described as of a mine of silver, gold, and quicksilver, which inconsistency tended strongly to impair confidence in the entire espediente. Petition had been pending nearly eight years when this espediente found its way into this case. First espediente was filed on the 30th day of Septem-



ber, 1852, and this one was filed on the 17th day of July, 1860. Time enough, certainly, had elapsed to enable a party to examine and ascertain what, if any, contradictions or inconsistencies appeared in his proofs, and to give him an opportunity to employ all proper means to obviate any such difficulty. Produced, as this document was, at so late a stage of the litigation, \*it [ \* 184 ] must be held that the burden of proof is upon the party producing it, not only to establish the authenticity of the paper but to do so by clear and satisfactory evidence. On the 27th of July, 1860, Pedro Chabolla was examined in respect to this expediente. Inquiry was made of him, whether his signature and those of the assisting witnesses were genuine, and upon looking at the document, he answered both questions in the affirmative, although he admitted, in the same deposition, that he never learned to write, and that it was with difficulty that he could "paint his name." His account of the matter was, that the papers were brought to him from the mine; and he says he signed them because he was requested to do so; and when asked how he knew the papers were correct, his answer was that he did not examine them, adding that "it was not for me to do that." One of the assisting witnesses, José Suñol, is dead; but the other, Pedro Sansevan, was examined, and confirms the statements of the preceding witness as to the genuineness of the signatures; but two witnesses examined by the United States, testified, without qualification, that the witness had previously stated to them that he signed the documents in the year 1848, and that they were copies.

Theory of claimant now is, that expediente No. 3 is the original filed in office, and that the expediente under consideration was a duplicate executed at the same time and delivered to the party. Three witnesses, Antonio Ma. Pico, Antonio Suñol; and José Noriega, were recalled and examined to prove that the document was executed in duplicate. They stated nothing of the kind in their first examination, nor did they do so in their second depositions. When called for the third time, after the fourth expediente had been discovered and introduced, the witness first named said that the document was signed on the day of its date, and he had no doubt he delivered it to the claimant; but the other two witnesses were less positive, and were only able to say that they supposed the document was signed at its date. Learned counsel admit that the theory in this behalf was started at rather a late stage in the investigation, but endeavor to excuse the claimant upon the ground that \*the fact was unknown to his at- [ \* 185 ] torneys, and that his witnesses did not remember it. At-

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torneys are certainly without fault, and so are the witnesses, unless they have finally attempted to remember what never occurred, which, from all the circumstances, there is too much reason to fear.

Parties holding large and valuable interests in real estate are generally careful to secure title papers which are supposed to be correct in form, and their solicitude and vigilance in preserving them are more or less active, according to their importance and the magnitude of the interest involved. Contrary to what might have been expected, as shown by experience, the claimant in this case, and those holding under him, lost all the original title papers to the mine, although the *espediente*, as they allege, had been executed in duplicate, and the mine and mining right or privilege were of incalculable value and importance. Fortuitous circumstances artistically described in the testimony, led, it seems, according to the theory of the claimant, to the discovery of the third *espediente*, called by his counsel the original, in the depository where it belonged, and where every one who made any inquiries upon the subject must have known that the papers of the *alcalde's* office had been deposited.

10. Impressions still prevailed, as the claimant represents, in the minds of those interested in the mine that there was somewhere in existence a duplicate original, but all inquiries and search for it had proved ineffectual until the time when the fourth *espediente* was discovered under the extraordinary circumstances detailed in the record. Those circumstances are well described by the witness, Thomas Bell; and inasmuch as they were even more fortuitous than those under which the third *espediente* was discovered, it may be well to allow the witness to state them in his own language. He was examined on the 17th of July, 1860, the day this last *espediente* was filed. \*Witness says:

Some time, about three weeks ago, at the request of Mr. Billings, I was looking for the documents relating to the *barras* in the mine of New Almaden, which at one time had belonged to Padre Real; not finding one of the documents which I was in search [ \* 186 ] \*of among the papers of the mine, I asked Mr. Young to get the box containing the papers relating to the estate of Walkinshaw, to see if it could not be found there. He produced the box, and then we proceeded to overhaul the papers. I saw a bundle marked—"Papers relating to the disputed barra," which I opened, and in looking over these papers I found one endorsed "Titles of Mines." I was struck with the antique appearance of the paper, and knowing that it was suspected that Walkinshaw had had documents relating to the Almaden mine in his possession, after

glancing over the papers, I took them to the office of Messrs. Peachy and Billings, to ascertain more particularly their nature. It was then discovered that it was an *espediente* which they had been anxious to obtain for a long time.

Explanation of the transaction as given by the claimant is, that Robert Walkinshaw, the undisputed owner of two shares in the mine, brought suit against Bolton, Barron & Co., to establish his right to a third share claimed by him on which the defendants refused to pay him dividends. He employed counsel and gave him certain papers which the counsel, who is now one of the counsel in the case, retained in his possession from January, 1853, when he was employed to bring the suit, until May, 1858, when he returned them to his client who gave him a receipt for the papers. Receipt is dated on the 14th of May, 1858, and the first paper named in it is a document in Spanish, headed "Año de 1845, *Espediente de denuncia posesion y compañía de la Mina de Azogue nombrado Santa Clara, jurisdiccion de St. José Guadalupe, en la Alta California.*" Five pages writing and certificate, endorsed "Titles of Mine."

Day after the date of that receipt the party signing it sailed for Scotland, where, in the following August, he died. Document remained among the effects of the deceased in the care of his son-in-law and the executor of his estate until it was brought to notice in the manner already described.

Deposition of the son-in-law, who was the executor of the estate, was also taken by the claimant. He confirmed the statement of the preceding witness, but adds that he had previously \*examined the papers of the deceased in search of documents relating to the title of the Almaden mine without any such success. Where the box had been kept, and whether so situated as to be accessible to other persons or not, the witness does not state; but he does state that the decedent before he left the country, handed him the documents found in the bundle, and that he enveloped them "in a piece of paper" and labeled the envelope.

His search on the former occasion, as the witness admits, was especially directed to find the *testimonio* of the act of juridical possession, but he made no such discovery at that time. First search, as in the matter of the third *espediente*, was unsuccessful, but the second was attended with no difficulty. Such a discovery at that stage of the controversy was doubtless thought to be an acquisition as valuable as it was unexpected, and if the document could be regarded as an authentic paper, free from suspicion, the claimant and those holding under him, in one aspect of the case, might well be of the opinion that its importance could hardly be over estimated.

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Assuming the other *espedientes* to be genuine, still the evidence in regard to them, even if viewed according to the theory of the claimant, showed conclusively that article 4, title 6, of the Mining Ordinance had not been complied with, because it was conceded that no attested copy of the proceedings had been delivered to the acquirer of the mine as "a corresponding title." When he filed his petition before the commissioners, he also filed copies of the first *espediente*. Both the copies and the original, subsequently produced, represented that the act of juridical possession contained the day of the month on which it was executed, and besides the document embraced the receipt of the *alcalde* for his fees and two certificates of Pedro Chabolla dated on the 13th of January, 1846, appended to the two petitions of the claimant. Those particulars were all wanting in the respective documents subsequently introduced. Favorable adjudication under such a state of facts could not rationally be expected, unless these glaring inconsistencies could be explained, because their effect was not only to [ \* 188 ] impair all confidence in those documents, but also to discredit all the witnesses who, under oath, had verified the first *espediente* and the several papers of which it was composed.

Mention is made of these circumstances as showing the urgent necessity there was for additional proof and the corresponding inducement to commit fraud by fabrication and forgery. Counsel of the claimant admit in their brief that from the time James A. Forbes was examined as a witness in relation to the first *espediente*, until May or June, 1860, it remained inexplicable, whence came the word thirty in the date of the first copy of the act of juridical possession, whence came the copy of the receipt of the *alcalde* for his fees, and whence came the copy of the two certificates of Pedro Chabolla which follow the respective petitions of the claimant. All these were found in the copy produced and filed as the first *espediente*, and up to that time had been treated by the claimant as parts of a genuine document. "Whence they came," say the counsel, "was the mystery," but their theory is, that the mystery was solved by what they now call the duplicate copy of the act of juridical possession, and in support of the theory they suggest, that it had long been supposed that such a copy must have been delivered by the *alcalde* to the claimant. Suggestions were also made as to the mode in which Robert Walkinshaw might have become possessed of the supposed original document; but it is a sufficient answer to all these suggestions to say that they are founded on mere conjecture, are not supported by the evidence, and have little or no foundation in the probabilities of the case. Production of that *espediente*, say

the counsel, "furnished the means of bringing in the testimony of all the witnesses concerned in (its) preparation who were yet living." Accordingly those witnesses who were called for the third time and re-examined, and although in their former depositions they had uniformly spoken of the espediente supposed to have been executed before the alcalde in the singular number, without any intimation in respect to a duplicate, yet at last, after the petition had been pending nearly eight years, they were, as they state, able to recollect that a duplicate was executed at the same time \*and delivered to the claimant, but their recollections [ \* 189 ] upon the subject are by no means as distinct as they were on a former occasion they testified to the effect that the first espediente was a genuine document. Such testimony, under the circumstances, is not entitled to credit, and such theories as those set up in respect to the supposed existence, loss and discovery of the third and fourth espedientes as genuine original documents are too speculative, sound too much in fiction, and are too thoroughly saturated with improbability to receive credence in a court of justice.

11. Frequent reference is made by the claimant in this connection to the evidence adduced as to the proceedings of the *Junta de Fomento* and other departments of the supreme government, as tending to confirm the testimony introduced to prove the genuineness of these documents, and it may be conceded that the evidence referred to has some indirect bearing in that direction, but it must be borne in mind that no one of those documents, nor any part thereof, was ever submitted to those departments, or to any one of them, and it is by no means certain that the officers of those departments, or any one of them, ever heard that any such documents had been executed. They had doubtless heard what the claimant had stated in his communication to the *Junta de Fomento*, but there is no evidence to show that they had ever heard anything more than that in respect to any of the supposed proceedings of the local authorities upon that subject. None of the documents were presented to them by the claimant, and of course there could have been no action in respect to their genuineness, which is the question now under consideration. Arguments which confound the question as to the genuineness of the documents, supposed to have been executed before the alcalde, with the question of confirmation by the home government, afford very little aid in the decision of the case, and, in point of fact, are entitled to no weight, because their effect, if any, is to mislead.

Strong, however, as our impressions are that the evidence fails to show that any one of the four espedientes, introduced by the claim-

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ant, is entitled to credit, still we are disinclined, in view [ \* 190 ] \* of the great complication of the evidence upon the subject, to rest the decision of the case upon that ground.

VI. Two other principal objections are made to the confirmation of the claim :

*First.* It is insisted by the United States, that it is not shown by competent evidence, that a public tribunal, empowered by law to take jurisdiction over the subject-matter of the acquisition of a mine, or mining right, or privilege, has ever acted in this case, and adjudicated to the claimant the title to the mine, as alleged by him in the petition.

*Secondly.* That if such a tribunal is shown by competent evidence to have taken any action in the case, still it does not exercise its special and limited jurisdiction in a manner required by law so as to constitute or evidence any title to the mine claimed by the petitioner.

1. Mines under Mexican laws, as before explained, whether situated in public or private lands, belong to the supreme government, and private persons can only acquire a title in one not previously discovered and made individual property according to law, by conforming substantially to the conditions ordained in the provisions of the 4th article of the mining ordinance as herein previously recited. Applicant must resort to the proper tribunal and present his written statement, specifying in it his name and the name of his partners, if he has any, the place of their birth, their residence, profession, and employment, and the most particular and distinguishing features of the place, hill, or vein, of which he asks adjudication. The title to such properties are acquired by the citizen or subject wherever Spanish law prevails by the adjudication of the proper tribunal having jurisdiction of the subject-matter. Contrary to what is supposed by the claimant, is the *adjudication*, or decree, of the proper tribunal in a case duly presented for decision, and the registry of the adjudication together with the proceedings on which it is founded, which vest the title in the applicant, and not the mere fact of discovery as was supposed at the argument. Without proof of discovery by the applicant, there can be no adjudication in

his favor, but the discovery of a mine, by a party in whose [ \* 191 ] favor there has been \* no adjudication by a tribunal having jurisdiction of the subject-matter, secures no right or title to the discoverer. Boundaries also must be fixed to carry the adjudication into effect or rather to complete it, else the title or claim, like other indefinite and uncertain interests in lands, will be void for uncertainty. Marking of boundaries also is essential under all

circumstances, whether the mine is situated in public or private lands, for if the location is in public lands, compliance with the requirement is essential to show what extent of the public domain has been segregated from the mass of such lands and has passed into private ownership.

2. Public convenience, therefore, in such a case requires that the boundaries should be fixed, and besides, unless the limits of the *pertenencia* were fixed and staked, or monuments set, other tribunals, whose duty it is to adjudicate lands to applicants for agricultural purposes, would be subjected to embarrassment and be led into error. Definite limits also to mining rights or privileges are equally necessary and important, where the same happen to be located upon the lands of private individuals, in order that the land owner, as contradistinguished from the owner of the mine, may have the means of knowing and be judicially notified, as to what portion of his land has been condemned and appropriated to the use of another.

3. Registry, also, is expressly required by the very article of the mining ordinance under which the party in this case claims title to the mine, and it is a great error to suppose that a compliance with that provision is shown by proving that sheets of paper, not executed at the same time, but assumed to constitute an *espediente*, were at some time placed in the office of the *alcalde* and remained there for a time in one of the pigeon-holes of his desk. Such a suggestion is destitute of any foundation. On the contrary, the requirement is in express terms that the statement of the discoverer, together with the time when he presented himself, "*shall be noted in a book of registry*, which the deputation and notary, if there be one, shall keep, and in respect to the action of the tribunal on the application, the provision is that an exact account shall be taken" in order that it may be \*added to the [\* 192] corresponding part of the registry with *the evidence of possession*, which shall immediately be given. Act of possession, therefore, is to be added to the registry, together with the action of the tribunal on making the adjudication, and they are both required to be noted in a book (*libro*) of registry.

4. Strict compliance with that provision is required as matter of public policy, because the mines of a country like Mexico are a great source of revenue to the government, and because it tends to prevent disputes and litigation; prevent fraud and false swearing; secure such rights of property, and promote order and a good understanding among miners holding and working contiguous *pertenencias*. (1 Gamboa per H. pp. 143, 144.)

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The tribunal empowered by the mining ordinance to exercise this jurisdiction was "the deputation of mining" for the territory or district where the mine was situated, or the nearest one thereto, should there be none there. (Halleck Coll. 224.) Former ordinances, especially that of 1584, on which Gamboa wrote, conferred the power of adjudicating such titles exclusively on the mining court within whose jurisdiction the mine was situated. (Ord. 1584, art. 17, Gamboa per H. 139.) Section 17th of that ordinance also provided "that in case *such registry* be not made in the manner, and within the prescribed time, any person may register such mine, and shall thereby have and acquire the right which such discoverer or other person who might have required the registry, *would have had* if he had caused the registry to be made." (Gamboa, p. 141.)

5. Cases occurred under that ordinance where mines were discovered in districts having no mining court, and in that state of the case there was no tribunal in the parent country which had jurisdiction of the subject-matter, and of course the matter had to be referred to the sovereign power, and to remedy the embarrassment arising under such circumstances from the want of a court to adjudicate such titles, it was provided, in the mining ordinance of 1783, that the court "nearest thereto" should have jurisdiction of such a case. Parties concede that the ordinance last named was in

force at the date of these proceedings, and unless it can be [ \* 193 ] shown, (and the burden is upon him who avers \*it,) that the provision referred to has been modified or repealed, it is clearly applicable to this case. Constitution of Mexico vested all the judicial powers of the republic in one supreme court of justice, and other courts and tribunals to be constituted in conformity to the instrument. (Coll. Mexican Constitution, tomo 1, titulo 5, art. 123.) Pursuant to that provision the tribunal general of mining, on the 20th of May, 1826, was deprived of its powers. New regulations were then adopted, which were from time to time amended, but it is not important to notice those decrees, because on the 2d day of December, 1842, a new system, carefully digested, was put in force, the 4th article of which constituted and regulated the tribunals of mining. (Halleck Coll. pp. 409, 424, 434, 441.)

Among other things it provides for the creation of "courts of the first instance" in each department, and for the mode of their election, and also provides that those courts, within their respective districts, shall exercise the executive, judicial, and economical powers given by the old ordinance. Halleck Coll. p. 441, title 4, art. 26.

6. Courts of the first instance were never organized in the de-



partment of California, and the argument of the claimant is, that in consequence of that fact the ordinary tribunals, as for example, an alcalde could take jurisdiction over such a subject-matter, and on the application of the discoverer, could adjudicate the title. But the position cannot be sustained, because by the express law of the republic, as evidence in the special decree of the 14th of January, 1843, it is provided that territorial deputations may continue to exercise their functions "until the courts of first instance \* \* are established." Halleck Coll. p. 443. Support to the position cannot be derived, as is supposed, from the fact that the law was so in some of the dependencies of Spain prior to 1783, because it is from the express terms of the ordinance of that year that the mining deputation derived their exclusive jurisdiction over the subject, and inasmuch as the supposed analogy on which the position was based fails, the position must fall with it.

7. Mexican policy also, and administration in regard to that \* department, afford strong ground to conclude [\* 194] that no such power was intended to be conferred upon any of the officers of the local government. Those officers were a governor, appointed by the supreme government, a departmental assembly, consisting of seven members, who were chosen by electors, but their election was subject to the approval of the home government.

Most of the important functions of the local government were performed by the governor and the departmental assembly; but the law also made provision for the appointment of prefects, who were to be nominated by the governor and confirmed by the general government; also sub-prefects, who were to be nominated by the prefects and approved by the governor. Provision was also made for ayuntamientos or municipal councils, whose ordinary members were elective; and also for the appointment of alcaldes and juaces de paz or justices of the peace, whose numbers were to be fixed "by the departmental assembly, in concurrence with the governor." Arrillaga, Recop. pp. 202, 214, 223, 230. Judicial functions were exercised by the prefect as well as the alcalde, and no reason is perceived for holding that the latter could adjudicate a mining title which might not be adduced with equal and even greater force to show that the same important duty might be performed by the prefect; but the truth is, there was no law which gave either the one or the other any pretense of jurisdiction in any such matter. Theory of claimant is, and so is the argument, that the jurisdiction must have been confided to some of the officers of the department, and that the presumption is, that the alcalde had jurisdiction, inasmuch

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as it is not shown that courts of first instance had been constituted and organized.

Giving the argument, however, its utmost force, it only shows that a law conferring upon an alcalde such a jurisdiction would have been a convenience to the inhabitants, and especially to the claimant; but it has no tendency to show there was any such law, which is the question to be decided. Opinion is expressed, by two or three of claimant's witnesses that an alcalde might make such an

adjudication, but they exhibit no law to that effect, nor do [ \* 195 ] they attempt to prove there was any such general \*usage:

and inasmuch as their opinions are not competent evidence, their testimony may be dismissed without further remark. Authorities of Mexico had long dreaded the influence of foreigners in that department, and although the policy of the home government was to promote the settlement and growth of the department, still they had always manifested an unwillingness to confer any more power upon the local government than was necessary to accomplish those objects.

Mineral wealth, if discovered, would furnish a motive to attempt the conquest of the department, and it may well be inferred that the authorities of the home government had determined to reserve the adjudication of titles to such important public interests to the federal tribunals. Strong support to that view of the case is derived from the course pursued by those authorities when the land system of the department was devised and put into operation.

8. Power to grant vacant lands was as early as the 18th of August, 1824, vested in the governor, in concurrence with the departmental assembly. Additional regulations upon the subject were adopted on the 21st of November, 1828, which exhibit a system as complete and perfect as is to be found anywhere. Granting vacant lands for agricultural purposes was by no means regarded as a matter of so much public importance as the adjudication of titles to newly discovered mines. Those provisions and regulations confer very ample power upon the governor to grant vacant lands in concurrence with the departmental assembly, but they confer no power upon them or upon any of the local authorities to adjudicate titles to mines. Grants of land made under those laws did not convey to the grantee the unsevered minerals in the soil or any interest in them, and there is no ground whatever to hold that the supreme government ever conferred upon any of the local tribunals any jurisdiction upon the subject under consideration. Authority of the alcalde, therefore, cannot be inferred from the fact of its exercise,

or from the fact that no other tribunal of the department was authorized to exercise such a jurisdiction.

VII. But if the *alcalde* had power to take jurisdiction of the \*subject-matter, still it is insisted by the United [\* 196] States in the second place that he had only a special and limited authority, and that he did not exercise it in the manner required by law. 1. His proceedings were based upon the written statement of the claimant, and that was upon its face exceedingly imperfect if not absolutely insufficient. Some of the provisions of the mining ordinance are doubtless merely directory, others may be regarded as conditions subsequent, but those appertaining to the registry of the mine, together with the action of the tribunal thereon, and in respect to the juridical possession of the same, are evidently conditions precedent; so that it is necessary, in order to support a title to such a right or privilege as a discoverer, to show that the party substantially performed those conditions. Unless a claimant shows a substantial compliance with those requirements the conclusion is inevitable, not that he has forfeited his right to the mine, but that he never acquired any such title. Forfeiture is of that which a party hath, but he cannot be said to have forfeited what he never had acquired, as the title to that which he had never acquired, must always have been in the State or in another person.

2. Nothing like forfeiture is pretended by the United States, and no such question arises in the case; but the proposition is, that the claimant never acquired any right or privilege in the mine, even if he was the discoverer, because he did not, as required by law, pursue the necessary steps to give vitality to the inchoate privilege or pre-emption accorded to the discoverer to proceed according to law, and ripen such privilege or pre-emption into a perfect or complete right by a registry of that which he had discovered before the proper tribunal, and by securing the juridical possession of the same under a legal adjudication of the title. His discovery, and its registration, as is well said by the counsel of the United States, gave him a right, within ninety days, to make an opening into the vein, and the further right to apply to the proper public authority and have that which he claimed to have discovered defined and set out to him and its boundaries marked, and a record made of his title to the defined *pertenencias*. When all this is done according to law, \*the inchoate privilege or pre-emption of a discoverer [\* 197] so to proceed is then ripened into a perfect or complete right, and his title to the mine comes into existence.

3. Returning to the written statement which in this case is the petition of the claimant addressed to the *alcalde*, and noting the

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representations it contains, it is clear that it is not a compliance with the requirements of the ordinance in many respects. Ordinance, for example, requires a written statement of the most particular and distinguishing features of the place, hill, or vein of which adjudication is asked, or of which he asks the grant, as the phrase is rendered in some of the translations. Representation in the statement or petition is, that he, the claimant, has discovered a vein of silver with a ley of gold "on the rancho of José Reyes Berreyesa, which was a hacienda of a league square, mostly table land, with disputed boundaries." Another requirement of the ordinance is, that the applicant shall give "the names of his partners, if he has any, and the place of their birth, their residence, profession, and employment;" and by article 6, of title 7, the discoverer is expressly forbidden to denounce a mine for himself having entered into a contract of partnership, and yet the claimant's petition which shows that there was a partnership, fails to disclose the names of his partners or any of the required particulars, and it also shows that he denounced the mine to himself alone.

4. Strong doubts are entertained whether the alcalde, even if he had jurisdiction of the subject-matter, was authorized to proceed and adjudicate the title upon the basis of such a statement; but it is not necessary to decide that question, as there are two other defects in the proceedings which are fatal to the pretensions of the claimant. No such registry of the particulars concerning the mine, or of the action of the alcalde upon the allegations of the petition, or of his proceedings in respect to the juridical possession of the mine was ever made, as is required by the provisions of the ordinance, nor were the pertenencias measured or definitely located, or the boundaries fixed, or the stakes set, as is therein required.

Registry has been required as the basis of the title to a [\* 198] mine wherever Spanish law has prevailed \*for more than three centuries, and probably no case ever occurred within that period which more fully showed the absolute necessity for such a rule or more fully exemplified its wisdom than the case under consideration.

When the alcalde was first called and examined in another suit concerning the proceedings before him, in respect to the registry of this mine, and the supposed juridical possession given of the same, he testified that the claimant applied to him to go and give him possession of the mine, according to the Mexican custom. Taking the account of the matter, as he then gave it, to be true, he went there with the claimant and others, and pointed out such boundaries as he thought the claimant ought to have; but he expressly

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stated, on that occasion, "that no fixed possession was given to him," for the reason that there was a dispute between him and José Reyes Berreyesa, on whose rancho the mine was situated.

Berreyesa, as the witness stated, would not consent that possession should be given unless the claimant would admit that he, Berreyesa, should have an interest in the mine, and as the claimant would not do that, he, the witness, did not give any fixed possession of the mine. Witness was three times examined in this case, and on two of the occasions he was interrogated upon this subject. His statements are to the effect that he with the claimant and others went to the mine; that after they arrived there, he sent for José Reyes Berreyesa, the proprietor of the rancho, and that he accordingly came to the mine; that he, the witness, made known to Berreyesa what it was that was proposed to be done; that at first he objected, but finally consented, and that he, the witness, delivered the possession to the claimant. They made no survey, fixed no boundaries, and set no stakes, and the witness expressly states that he had no idea whether the three thousand varas in all directions were to be laid out in a square or round; that a part of the tract only was to be located around the mine, and the residue on the public domain in that neighborhood.

6. Nothing was done on the land; and if the witness is to be believed, very little was said, except that he stated that he \*delivered the three thousand varas in all directions to the [ \* 199 ] claimant. During the examination he was reminded of his former statements upon that subject, and was requested to explain the differences, but his answer was that, according to his understanding, there was no contradiction between his testimony then given and the statement in the act of possession. Alcalde Antonio M<sup>o</sup>. Pico had a secretary by the name of José Fernandez, who was a witness in this case, and who was also the *escribano* of the court, but the Padre Real expressed a wish that these documents, whatever they were, should be prepared by one Gutierrez, a teacher at the mission of Santa Clara, which was a league or two from the Juzgado of San José Guadalupe. They were not, therefore, prepared by the secretary of the court, and all he knows upon the subject is, that two or three days after the party returned from the mine, the schoolmaster, Gutierrez, brought him the document, and said, "there, now, it is all finished, and here is your fee," giving him three dollars and a half, and "so," in the language of the witness, "the document remained in the court," but he expressly states that he never read it, or examined it, and when asked

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by the United States what he did with it, he answered: "It remained there in court. I did nothing else with it."

Other witnesses were examined upon these topics, but the statement given contains the substance of the evidence on both; and all the witnesses agree that there was no survey, no stakes set, and no boundaries marked in any manner. On this state of the case, it is insisted by the United States, that the acts of the alcalde were absolutely void, but the claimant insists that even conceding the irregularities to have been such as represented, still that the acts of the alcalde were not absolutely void, but at most only voidable, and that they were afterwards ratified and confirmed by the supreme government.

7. Reliance, it is proper to remark, is placed by the claimant upon the evidence of ratification, as affording a sufficient and complete answer to all the objections taken to the claim made by him to the mine. Examination of that evidence, as exhibited in the copies of documents, introduced as true copies of originals [ \* 200 ] \*on file in the departments of the supreme government, has already been so fully made that a brief reference to it in this stage of the investigation will be sufficient.

Statement of the claimant in his communication to the *Junta de Fomento* is, that he had discovered a mine of quicksilver in the mission of Santa Clara; that he had denounced and taken possession, not only of the mine, but also of an extent of three thousand varas in all directions, that he had formed a company to work it, had constructed the pit, and had complied with all the conditions prescribed by the ordinance. Required, as he was, to make the representation in writing, it was of course prepared with deliberation; and yet he falsely states that the mine is situated "in the mission of Santa Clara," and suppresses altogether the fact stated in his petition, and repeated in the act of possession, that the mine was situated on the rancho of José Reyes Berreyesa.

He refers to none of the documents, and none were produced, and this remark applies as well to his seventh proposition as to his representations in the preliminary part of his communication to the junta. They adopted his seventh proposition, and recommended to the president, through the minister of justice, that the possession given to the claimant by the local authorities, as he represented, should be confirmed. Two accounts are given, as to what was the action of the president on the occasion. First, in the dispatch of the minister of justice, and secondly, in that of the minister of relations.

In the first, the language is, that the president "has been

pleased to approve in all its parts the agreement made with (the claimant) in order to *commence the working of said mine;*" and in the second, the language is the same, except that the purpose of the agreement, as described, was "*to commence the exploration of that mine.*" Neither the one nor the other contains a word which, by any proper construction, can be held to confirm the acts of the local authorities, or any of them, or to vest in the claimant any right, title, or interest in the mine. None of the documents executed by the alcalde were before the president, and it does not appear that he ever heard of them in any other \*man- [\* 201] ner than by those vague representations, or others of a similar character. Action of the president evinces caution and circumspection, and the several communications taken together clearly show that he did not act at all upon the seventh proposition of the claimant, or upon his representations in respect to the juridical possession of the mine; and there is nothing in the marginal order in any respect inconsistent with this view of the case, as it is evident that the purpose and intent of that order was accomplished in the contemporaneous dispatch of the minister of justice. Credence was evidently given to the representations that a mine had been discovered, and the president was willing that an advance of \$5,000 or \$6,000 should be made to the claimant to enable him to commence its exploration. Directions were accordingly given to approve the agreement to that extent, and to make the advance and furnish the retorts and other apparatus therein mentioned.

8. Second grants of land in the department of California were seldom made by the governors, and as the claimant already had one, he could hardly expect to obtain another without the special approbation of the supreme government. Hence his eighth proposition that a grant should be made to him "as a colonist," which was approved by the president, so far as appears in the dispatch of the minister of relations already explained. Grants of that description conveyed no interest in the minerals, as was well known to the claimant; and in respect to the eighth proposition, the president was silent, evidently reserving that matter for further information and a more deliberate consideration. Irrespective, therefore, of the question of fraud, we are of the opinion that, by the true construction of the several communications, the claimant fails to show that the acts of the alcalde have in any manner been ratified or confirmed by the supreme government.

It is clear, therefore, that the respective documents executed before the alcalde must stand or fall, by what appears in the instruments, when considered in connection with the evidence, show-

ing what was done at the time of their execution. Conceding full credit to the witnesses, and giving the utmost scope to [ \* 202 ] their \* testimony consistent with the language employed, still it is obvious from the claimant's own showing that he never made any registry of the mine, within the meaning of the provision requiring it to be made. Such a document cannot be said to have been registered, merely because it was handed to the secretary of the alcalde, before whom it was executed, and was for a time somewhere in the court-house, especially when it appears that it was subsequently abstracted from the depository, if such it may be called, and was not returned to it for years afterwards, and then clandestinely and under circumstances of the greatest suspicion. Constrained as we are to regard the facts in point of view, the conclusion is inevitable that there was no legal registry of the mine, and the evidence is all one way to show that there was no survey of the nine hundred pertenencias granted, and no boundaries were fixed, and no stakes were set as required in the ordinance. Assuming, therefore, that the alcalde had jurisdiction over the subject-matter, still, as it was but a special and limited authority, in order to give any validity to his acts he must exercise it in the manner required by law, and not having done so his acts are void. *United States v. Osio*, 23 How. p. 283; *United States v. Castellero*, 23 How. p. 466.

VIII. Conduct of claimant throughout shows that he knew that he had no title, as is plainly to be inferred from the fact that in the several conveyances made by him he never referred to the registry of the mine or to the acts of juridical possession supposed to have been executed before the alcalde as the source or foundation of his title.

1. Whenever he referred to the source of his title he uniformly pointed to the writing of partnership. Sale of five barras or shares of the mine was on the 17th day of December, 1846, made by the claimant to Alexander Forbes, of Tepic.

2. Negotiations for the purchase and sale commenced on the 5th of the same month between the claimant and Francisco M. Negrete, the agent of the purchaser. Several interviews took place, but the negotiations were suspended to await the arrival of the Padre Ugenio McNamara, the agent of José Castro. He arrived from [ \* 203 ] Tepic a short time before the contract of sale was \* completed, and Negrete testifies that up to that time he had seen no other document than the writing of partnership, and no other had been mentioned. Padre McNamara brought with him



the contract of lease or avio, which had been concluded between him, as the agent of José Castro, and Alexander Forbes.

3. Claimant approved the contract of avio, voluntarily putting into it his claim to the two square leagues of land. At the same time, also, he executed the conveyance of the five shares to the purchaser, but in none of these transactions was any mention made of the registry of the mine or of the act of juridical possession, leaving it to be inferred that the writing of partnership was the only document ever executed before the alcalde, or certainly that there was no other that the claimant thought proper to exhibit to a purchaser.

IX. Much stronger evidence, however, is exhibited in the record to show that the parties most interested in the mine, and who were engaged in working it, knew full well that the supposed title was invalid, as is fully shown by the correspondence between James A. Forbes and Alexander Forbes, or between the former and Barron, Forbes & Company. More than forty letters between these parties are exhibited in the record.

Brief references will be made to such as have the most direct bearing upon the question under consideration, omitting all such parts as are not material to the inquiry, but preserving the substance. 1. Under date of the 5th May, 1847, James A. Forbes suggests to William Forbes, but evidently in reply to letters received from Alexander Forbes, that it is of the most vital importance to obtain from Mexico a positive, formal, and unconditional grant of the two *sitios* of land conceded to the claimant according to the decree appended to the contract, and also an unqualified ratification of the juridical possession which was given of the mine by the local authorities, including, if possible, the three thousand varas of land given in that possession as a gratification to the discoverer. He also suggests in the same letter that the documents should be made out in the name of the claimant and his partners.

2. No letter is produced which is a direct reply to that \*communication. Record shows that Alexander Forbes vis- [ \* 204 ] ited California early in October, 1847, and it appears that he remained there until near the close of March, 1848, engaged, at least for a part of the time, in exploring the mine and in overseeing the prudential affairs of the company. During that period other persons acquired an interest in the mine, and among the number were Barron, Forbes & Company, and they accordingly wrote to James A. Forbes, under date of the 11th of April, 1849, informing him that hereafter he might expect that the mine would be worked to the utmost of its capabilities of production. On the 20th of

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May, 1849, they wrote another letter to the same individual, saying in effect that from certain circumstances that he had mentioned it might be necessary to purchase some lands in the vicinity of the mine and hacienda of New Almaden, and authorized him to make such purchases, not to exceed in price the sum of \$5,000, as might be necessary to secure the possession of the mine and hacienda, or to effect such other arrangements as he might deem necessary for that purpose.

3. Seven days after the date of that letter, and before it was received, James A. Forbes arrived at Tepic, and while there left with Alexander Forbes the following memorandum to be delivered to the claimant: "Very private." Memorandum of the documents which Don Andres Castellero will have to procure in Mexico.

"1st. The full approbation and ratification by the supreme government of all the acts of the alcalde of the district of San José, in Upper California—in the possession given by the said officers of the quicksilver mine situated in his jurisdiction, to Don Andres Castellero, in December, 1845.

"2d. An absolute and unconditional title of two leagues of land to Don Andres Castellero, specifying the following boundaries: On the north by the lands of the rancho of San Vicente and Los Capitancillos; on the east, south, and west by vacant lands or vacant highlands.

"3d. The dates of these documents will have to be arranged by Don Andres, the testimony of them taken in due form, [ \* 205 ] and \* besides, certified to by the American minister in Mexico, and transmitted to California as soon as possible.

"Tepic, May 27, 1849."

Proofs in the case show that the author of that memorandum returned to San Francisco, and on the 28th day of October following, in a letter to William Forbes, he again called his attention to the importance of his former suggestions as to the necessity of perfecting the title to the mine. In that letter he also referred to verbal explanations previously given by him to his correspondent and Alexander Forbes, and then proceeds to impress upon the mind of his correspondent the vast importance of securing from Mexico the documents comprised in the memorandum left with Alexander Forbes, when he was in Tepic, for the claimant. Two days afterwards he wrote again to Alexander Forbes, in which letter, among other things, he says to his correspondent, you will now readily perceive the great importance of my advice to you to purchase a part both of the lands of Cook and of the Berreyesas. You were of the opinion that this measure would not be necessary in view of

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the supposed facility of getting the title to the mine perfected in Mexico, and he complains that more than five months have elapsed since it was decided that the claimant should procure the necessary documents in that city, and that they have not been sent to him.

4 His description of his situation shows plainly that he was in great want of the documents, because he says that on the one side he depended upon the precarious and illegal possession of the mine granted by the *alcalde* of the district to the claimant, who was himself in reality the judge of the quantity of land given by the *alcalde*; and on the other side, he says he was attacked by the purchasers of the same land declared by the claimant himself to comprise the mine. Evidently that letter was regarded as one of importance, for it called forth two replies, one from Barron, Forbes & Co., and one from Alexander Forbes. By the one first mentioned, he was informed by his correspondent that on the 13th of the same month they had enclosed to him a notarial copy of the grant of land made by the Mexican government to the claimant.

\*They acknowledged therein the receipt of his letters, [ \*206 ] thanked him for his able conduct, expressed satisfaction in view of the document sent, that he had not been obliged to purchase the land of Berreyesa, but submitted the matter to his best judgment, requesting him however, to keep in view, "that at all hazard, and at whatever cost, the property of the mine must be secured," adding, "Castillero, we expect, will soon be here from Lower California, and if anything can be done in Mexico, he is the fittest person to procure what may be wanted." Recurring to the other letter, it will be seen that it was more guarded, but the writer recommends that his correspondent and agent should proceed, without fear of disapproval, or waiting for instructions, in taking such measures as shall preserve this valuable "negotiation" from any risk from those unprincipled claimants who have lately given him so much trouble, or from any other proceedings that may take place.

5. Another letter, also was written by Alexander Forbes to James A. Forbes, under date of the 1st of December, 1849, in which he stated that the copy of the grant of land made to the claimant was, by mistake, not the one meant to be sent; and he explains the difference, which was, that the one sent was directed at the foot to the governor, but the proper one was directed to the claimant, and was deposited at Monterey. Explanation is also given as to the difference in the legal effect between the two documents, which was, as explained, that by the first one the delivery by the governor was perhaps necessary, whereas the other, being addressed

directly to the claimant, did not require that formality, nor was any other proceeding necessary, thus making it, as the writer affirmed, a better document than the greater part of the other titles for lands in that department.

Having made these explanations, he then expressed the hope that the well-known cleverness of his correspondent had already enabled him to find out the mistake; suggesting, but rather doubtingly, that the one previously sent should be withdrawn, and the second one substituted in its place; but presently, as if upon reflection, mentions another difficulty which might arise, and that [ \* 207 ] was that the copy of the grant of the two *sitios* of land \* inserted in the contract of lease or avio was also directed to the governor, and in view of that fact he finally decided to send a copy of all the documents and leave it to the good judgment of his correspondent to make such use of them as he should think proper. Nothing need be remarked respecting the copy of the document last sent, except to say that if it was addressed to the claimant it was a forgery, as the whole evidence shows that but one dispatch upon the subject was ever issued by the minister of relations, and that was directed to the governor.

6. Reference will next be made to another letter from Alexander Forbes under date of the 3d of February, 1850, which is also addressed to the same person as the preceding letter. Among other things the writer states that he has every reason to believe that the documents mentioned by his correspondent would be found in the city of Mexico, and as the claimant would return that way he had no doubt they would be procured. In another part of the same letter he also states that at present they think it may be the best plan "to get an authenticated copy of the approval of the Mexican government of the grant of three thousand varas given by the alcalde on giving possession of the mine," "as a doubt may be started whether the alcalde, acting as the '*Jefe de mineria*,' had a right to make this grant, yet if approved by the government of Mexico, before the possession of the country by the Americans, there could be no doubt on the subject." \* \* \* \* \*

Castillero says such approval was given, and that on his arrival in Mexico he will procure a judicial copy of it. This is the plan we shall adopt if we hear nothing from you to alter this resolution. Writing from the mine, James A. Forbes, on the 26th day of February, 1850, replied to that letter, and the importance of that reply makes it necessary to give a somewhat extended extract from it as disclosing the intent and purpose of the entire series. Speaking of the claimant, he says:

"He succeeded in obtaining the grant of two sitios to himself on the mining possession in *Santa Clara*, while that very act of possession declares that the mine is situated on the lands of one José R. Berreyesa, five leagues distant from Santa Clara, and \*you will at once perceive that such a discrepancy would [ \* 208 ] not fail to attract the attention of United States land commissioners and to put the case of the mine in great risk in the judicial ordeal to which its title will be subjected.

"Without troubling you with what I have so many times written and explained to you verbally, on the importance of the acquisition of the *document*, I will only say now what it *must* be, and it is this:

"1. A full and complete ratification of all the acts of the *alcalde* of this jurisdiction in the possession of the mine.

"2. A full and unconditional grant to Castellero of two sitios of land covering that mining possession, expressing the boundaries stated by me in the memorandum I left with you at Tepic. Both of these documents to be of the proper date, and placed in the proper governmental custody in Mexico; and—

"3. The necessary certified copies of them duly authenticated by the American minister in that capital, taken and sent to me at the earliest possible moment."

Prompt reply was made by Barron, Forbes & Co., to that communication, under date of the 2d of March, 1850, in which they say: "Mr. Barron and Don Andres Castellero, are about to proceed to the city of Mexico and will attend to what you have recommended. When that letter was written, the persons therein named were about to proceed to Mexico, but Alexander Forbes, nine days later, wrote a letter to the same correspondent, in which he stated that Mr. Barron and Castellero have gone off to Mexico, and I wrote them to-day *respecting the document you know of, which, if possible, will be procured.*" Wishing, doubtless, to keep his correspondent well advised of the efforts being made to comply with his requisition for the title papers to the mine, he wrote him again on the 7th of April, 1850, in which he stated "that Mr. Barron and Castellero have arrived in Mexico, and have every prospect of *finding the documents you are aware of*, and which will, of course, be forwarded as soon as possible."

Counsel for claimant admit that every one of these letters are genuine, and the proofs in the case are full to that effect. Comments upon these extraordinary documents are unnecessary, as \*they disclose their own construction and afford a [ \* 209 ] demonstration that those in the possession of the mine,

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holding it under conveyances for the claimant, knew full well that he had no title.

X. More than that can hardly be required in this case, but it is equally true, and satisfactory proofs are exhibited in the record to show it, that Mexico herself knew, *must have known*, that the pretensions of the claimant were unfounded, else she never could have agreed to the 10th article of the treaty, or, when that was stricken out, never could have given her sanction to the corresponding explanations that were signed by the duly authorized representatives of both countries. Remarks, however, upon that topic are unnecessary, and we forbear to pursue the subject.

The decree of the district court in No. 133 is reversed, and in the other the appeal is dismissed, and the cause remanded with directions to dismiss the entire petition.

Mr. Justice CATRON, dissenting: I am of the opinion that Castillero acquired an incipient right by the discovery of the mine, and the surface of the land lying above the mine, to the extent that it was adjudged to him by the district court.

I also think Castillero made registry of his discovery before the proper tribunal according to the Mexican laws as they existed in the territory of California at the time the registry was made and notified to the public. That the alcalde had jurisdiction as a judicial magistrate in the absence and non-existence of any other authority in California to make the registry and give possession; and that this state of the law was virtually recognized by the mining junta at the city of Mexico, when Castillero applied to that tribunal for assistance in money, lands, and retorts, to assist him in working the mine. The request was promptly granted by the junta, with two leagues of land to furnish fuel for evaporating the quicksilver; and this proposed grant, the president of Mexico sanctioned, referring the application for the grant of land to the governor of the territory, but which was never presented, and could not be, owing to the American war.

[ \* 210 ] \*These officers of the supreme government were fully aware that no mining boards existed in California, nor any courts of the first instance; and that therefore the court of the alcalde was the tribunal exercising the powers of a court of the first instance. Such is the settled construction of the alcalde's power in California. *Mena v. Le Roy*, 1 Cal. R. 220. The rule in Mexico was, that in the absence of mining deputies, the ordinance judges might act, and did in fact act, both in registering the discoverer's application and in giving him judicial possession of the mine. So

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various witnesses prove, and among them Mr. Larkin, our consul at Monterey, at the time of this discovery.

I think it true, beyond any reasonable ground for doubt, that in other parts of Mexico, *alcaldes* did act on applications such as that of Castillero, where gold or silver was discovered, and that many mining titles are held by virtue of registries and acts of possession transacted before *alcaldes*, and recorded in the form of *espedientes* in their courts, just as the evidence of Castillero's was found in *Alcalde Pico's* office. Nor have I any doubt, whatever, that if the Mexican government had continued in California, that the title to this mine would have been confirmed to Castillero, not only promptly, but without dispute, concerning *small* and immaterial irregularities. That government, in my judgment, would have recognized the discoverer's equity, founded on the right of discovery. This discovery is free from doubt, nor is the *fact* of discovery disputed. So the Mexican officers from the president down, treated it when presented to them, and so the judges of the district court held, when they confirmed the claim. Their judgment, and the reasons for it, we are called on to review; and it is due to them to say, that, in a long judicial life, I have never had presented to me a case so laboriously and thoroughly investigated in the lower courts. With them this case has been the study for years. The claim, perhaps, covers the most valuable mine in the world, and its title has been litigated at an expense and with a degree of labor and ability rarely equalled and never excelled within my experience.

I have examined the opinions of the judges who decided the \*cause in the district court and the briefs of counsel, [ \*211 ] and have verified the arguments by the record on all material questions, so far as I thought them material, and my opinion is, that the law and the facts discussed by the district court, and on which its judgment is founded, furnish reasons that cannot be answered, showing that the claim is valid. And I adopt the opinion and reasons preceding the judgment below as my opinion in the case here.

Judge Hoffman's individual opinion displays an astuteness and a knowledge of the facts, and of the mining laws applying to the controversy, hardly to be excelled, and with which I fully concur, with the exception, that I think he was in error in maintaining that the president of Mexico granted the two leagues of land covering the mine. The president referred the request of Castillero for the land to the governor of California, to be proceeded on by him, according to the act of 1824, and regulations of 1828. This was not done by the governor, because the United States troops expelled him and

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broke up the Mexican authorities exercising the granting power, before he had time to act.

It was obviously a matter of great anxiety with the supreme government, that this quicksilver mine should be worked immediately, and as extensively as possible, because Europe had to be relied on for a supply of quicksilver, without which the gold and silver mines of Mexico were comparatively worthless. This discovery of Castillero was, therefore, esteemed by the mining junta and the higher officers as of the greatest importance. So important was it deemed, that our government was officially notified by our consul, Mr. Larkin, (acting nearest to the mine,) that the discovery had been made. The mine drew to its development a great amount of capital. Nearly a million of dollars has been expended in opening and bringing forth its resources. The public have been benefited many millions by the quicksilver furnished to those working the gold mines discovered in California, and on both sides of the Rocky mountains. The public benefit, past and prospective, can hardly be over-estimated. So far from being the subject of reproach and severe criticism, the wealthy proprietors who have worked [ \* 212 ] this mine \* with success, are entitled to our approbation; as they have undoubtedly been public benefactors. Truly, their object was gain; but they have done that which poverty could not accomplish, and they have done that which the United States, as the successful litigant, will, in all human probability, fail to do; that of being successful miners.

Much stress has been laid on the fact, that James Alexander Forbes proposed to his associates to forge a title to this mining property: Forbes, apprehending that Castillero's claim was not valid, because the proceeding to acquire a legal interest was irregular. But no step was taken to fabricate an apparent title, nothing was done towards its accomplishment. The proposition died in its conception, and as a controlling circumstance in the case the fact is worthless.

1. That Castillero discovered the mine is true beyond controversy.

2. That he registered the fact of discovery in the alcalde's office, and that it was made notorious, is, I think, true. It was officially communicated to the Mexican congress by secretary of interior relations; that it was prominently notorious in California; was officially communicated to our government, and was published in the newspapers of the Sandwich Islands.

3. Nor is it open to any dispute, as it seems to me, that Castillero's right, as a discoverer, was recognized by the supreme government of Mexico, as a valid and highly meritorious claim.



4. The mine was never denounced by any one for irregularity in the proceeding to perfect the title to it, nor for abandoning the possession.

In this condition the claim stood when we acquired the country; and we are bound by the treaty to protect all just private interests in lands in the territory acquired by it. I, therefore, think the judgment of the district court should be affirmed.

Mr. Justice WAYNE, dissenting: I concur with Mr. Justice CATRON and Mr. Justice GRIER, for the reasons given by them, and for other reasons expressed in the printed opinions of Judge \*McAllister and Judge Hoffman, in dissenting from the [\* 213] judgment of this court just announced in this case.

I think that the claim and title of the petitioner, Andres Castillero, to the mine known by the name of New Almaden, in Santa Clara county, northern district of the State of California, is a good and valid claim and title, and that the said Andres Castillero and his assigns are the owners thereof, and of all the ores and minerals of whatsoever description therein in fee simple. In my judgment, also, I concur with the learned judges of the district court, &c., &c., that the said mine is a piece of land embracing a superficial area, to be measured on a horizontal plane, equivalent to seven pertenencias, each pertenencia being a solid, of a rectangular base, two hundred Castilian varas long, of the width established by the Ordenanza de Minería of 1783, and in depth extending from and including the surface down to the centre of the earth; said pertenencias to be located in such manner as the said Andres Castillero or his assigns may select, subject to the following conditions: First, that the said pertenencias shall be contiguous, that is to say, in one body; and secondly, that within them shall be included the original mouth of the mine, known as New Almaden.

Having thus fully expressed my concurrence in the decree rendered by the district court in favor of Andres Castillero and his assigns, and my dissent from its reversal by this court, I will add that, in my opinion, it is fully shown by the testimony and documents in the record that in no thing done by Castillero or his assigns, in connection with the mining claim, is there any proof of fraud; and I believe, from the testimony and from those documents, that the petitioner and his assigns have rights under the 8th article of the treaty with Mexico, of which they cannot be deprived by any judgment rendered by this court or its proceedings upon the record brought into this court by appeal.

I adopt and herewith annex to this dissent the opinion of his

The Calais Steamboat Company v. Scudder.

Honor, Ogden Hoffman, district judge, (as embodied in the record,) as the best way of showing my appreciation of the [ \* 214 ] law \* and merits of this case, and of his judicial learning and research in connection with it.

Mr. Justice GRIER concurred in the opinion of Mr. Justice CATRON.

THE CALAIS STEAMBOAT COMPANY, Appellants, v. SCUDDER, Administrator of Van Pelt.

2 Black, 372.

PRINCIPAL AND AGENT—INNOCENT PURCHASERS FROM THE LATTER.

Van Pelt, who resided in California, having directed Vanderbilt, as his agent, to contract for and superintend the building of a vessel in New York, with instructions to make all the contracts in the name of the agent, and to act as her owner generally died while the vessel was in process of construction. Though he and his administrator furnished the money to pay for the building of the vessel, Vanderbilt took the builders' certificate in his own name, and had her enrolled in his name at the custom-house, and sold her to appellants for full value. Held by the court:

1. That all this having been done at Van Pelt's request, to hide his interest in the vessel, and the same course continued by his executor, the appellants finding him in possession of the vessel, with all the documentary evidence of a good title, had a right to buy of him, and would take a good title, unless they had notice of the equitable title in Van Pelt's administrator.
2. That the fact that the administrator, after the death of Van Pelt, sent another agent to New York, though whom the money was paid for the work and materials, but who did not interfere with Van Pelt, does not change the state of affairs.
3. The purchasers paid full value, bought of the person who had the legal title, and deny all knowledge of any defect in his title or his right to sell under oath; and though the contested point in the case, the proof fails to establish such notice of the interest of Van Pelt's estate as to impeach the fairness of the purchase.
4. The burden of proof in this matter was in complainants below, and they have failed to sustain the allegation.

APPEAL from the circuit court for the district of Maine. The case is fully stated in the opinion.

*Mr. B. R. Curtis* and *Mr. Hutchins*, for appellant.

*Mr. Shepley*, for appellee.

[ \* 373 ] \* Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from a decree of the circuit court of the United States, for the district of Maine.

The bill was filed in the court below by Scudder, the administrator of John Van Pelt, deceased, against the Steamboat Company, claiming title to thirteen-twentieths of the steamer *Adelaide*, as be-

longing to the estate of his intestate, and a consequence of this interest to the complainant, an account of her earnings, &c.

The respondent set up, by way of defense, title to the whole of the steamer as *bona fide* purchasers and for full value from one William W. Vanderbilt, in the city of New York.

The case discloses that John Van Pelt, a resident of California, in the spring of 1853, employed Vanderbilt, an engineer and constructor of steamers, to visit the city of New York and there enter into contracts, and superintend the construction of the steamer in question, he, Van Pelt, furnishing the necessary means for the purpose. The contracts were to be made in the name of Vanderbilt, the builders' certificate to be taken, and the enrollment, at the custom-house, made in his name as owner. This instruction was given by Van Pelt to Vanderbilt for the avowed purpose of concealing his own name in the construction of the vessel, as, for reasons not material to state, he did not wish it to be known in the city of New York, or in California, that he was interested in her. He was very specific and urgent on this point; for, in one of his last letters to Vanderbilt, written at his request, 13th September, 1853, (he died on the 29th,) he says, "You are not to know that he (Van Pelt) has any interest in the boat; and, that you must be more particular in talking and writing about her and her destination."

The boat was built in New York in pursuance of this authority and these instructions. The contracts were entered \*into for the hull and engines in July, 1853; for joiner- [ \* 374 ] work, painting, &c., at a later date. All made in the name of Vanderbilt. She was finished in September, 1854. In the latter part of August of the same year, two agents of the respondents visited the city of New York for the purpose of buying a steamboat to be put on their line of steamers in the place of one disabled, and saw or had seen the steamer in question advertised in the daily city papers for sale. And, on application to Vanderbilt, and after examination of the vessel and the usual negotiations as to price, on the third of August the purchase was made for the sum of \$88,000—\$5,000 paid down, \$15,000 23d August, and the balance 9th September. Vanderbilt, after having procured the usual builders' certificate, to which he was entitled as contractor for the building of the vessel, had her enrolled in his own name as owner; and then, on the 9th September, executed a bill of sale to the purchasers, under whom the respondents claim title.

Upon this simple statement of the case, it is not to be doubted but that the legal title to this vessel passed to the purchasers; for, although as between Vanderbilt and Van Pelt, his principal, or the

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estate of Van Pelt, the legal title could not avail, beyond a lien for his services or for any advances; yet, as it respects third persons, who have bought in good faith and for a valuable consideration, the rule is different. The question then arises between two innocent parties, and the equity of the case turns against the party who has enabled his agent or any other person to hold himself forth to the world as having not only possession, but the usual documentary evidence of property in the article. 3 B. & Cr. 38; 4 D. & A., S. C.; 8 Cow. 238.

The case furnishes a very strong illustration of this principle. All the indicia of property in this vessel in Vanderbilt existed from no fault of his, for he was clothed with it by the express authority of the principal. Van Pelt, therefore, took upon himself knowingly the responsibility of vesting the property of the vessel in Vanderbilt, as he must have known that it was in his power to deal with it as owner. Besides, he was extensively engaged in the [ \* 375 ] business of steamboats in the waters of California, \*and doubtless understood, in point of fact, the responsibility he was assuming. Van Pelt died in September, 1853, while this vessel was under contract for construction. The event, however, did not interfere with it, as his legal representatives continued the arrangement the same as before—furnishing the necessary funds, and carrying on the work till the vessel was finished. They took the place of Van Pelt.

In order to weaken this view of the case, it is said that Van Pelt, before his death, changed the agency of Vanderbilt by the appointment of one D. P. Vail. If this were conceded, unless it had the effect to change the apparent ownership of the vessel in Vanderbilt, the circumstances would be immaterial. No secret arrangements between the parties could affect third persons. But there was no change in the instructions to Vanderbilt of any importance in the case. The authority of Vail was confined to the furnishing of the vessel after she was finished, and to the taking charge of her as captain in carrying her to California. The funds furnished by the owners passed through his hands to Vanderbilt. In one of the last letters written by Van Pelt, 1st September, 1853, to Vanderbilt, before his death, he says—speaking of the vessel: “I wish the bill of sale to be made for D. P. Vail, ten-twentieths; R. Chenery, four-twentieths; R. M. Jessup, three-twentieths; W. W. Vanderbilt, two-twentieths; and Frank Johnson, one-twentieth.”

These instructions to Vanderbilt related to his disposition of the vessel after her completion, the names and shares representing the owners, and their interest. The ten-twentieths in Vail's name rep-

resented the interest of Van Pelt, and was placed there to conceal his interest agreeably to his original purpose.

These instructions, whatever may have been their effect upon the parties concerned, had none as it respected the apparent relation of Vanderbilt to the vessel. He remained in possession of her and of all the documentary evidence of property, and was thus held out to the world as the legal owner. Indeed, no change was contemplated in this letter till the boat was finished. Vanderbilt then was to give a bill of sale to the persons named, Van Pelt's interest still to be concealed. We lay out of the case, \* there- [ \* 376 ] fore, all the evidence in respect to the connection of Vail with the construction of the vessel, as in no way affecting the ostensible ownership of her by Vanderbilt.

It is insisted, however, that, assuming the respondents obtained the legal title of the vessel by the purchase and bill of sale of Vanderbilt, still the title was defective, inasmuch as they are chargeable with notice of the equitable interest of the estate of Van Pelt. This, in our view of the case, is the only serious question in it.

It is admitted that the respondents paid the full value of the vessel at the time of the purchase, \$88,000. They had no motive, therefore, to make the purchase of a vessel of doubtful or defective title. So far as regards the contract of purchase itself, its terms and conditions, there is nothing inconsistent with the most entire good faith. If the vessel had been purchased under her value, or the mode of payment had been prejudicial to the vendor, or any special gain had been achieved by the purchasers, the court would necessarily approach this question of notice with very different impressions from those proper in this case. Down to this point, the evidence of good faith is undeniable, and must be overcome by the proofs of the adverse party. We go one step further; with such evidence of good faith from the terms and conditions of the contract itself, the proofs to overcome it should be more full and direct, more unequivocal and certain than in the case of a like impeachment of a hard and unequal bargain.

Before we enter upon the proofs on this point, it may be well to ascertain, with some degree of exactness, the precise practical question involved in this charge of notice.

The estate of Van Pelt claims thirteen-twentieths of the vessel, on the ground that the funds of Van Pelt in his lifetime, and of his estate since his death, were furnished to the extent of this interest to build the vessel. The claim is for a latent equitable interest resting in the heirs or personal representatives of the intestate. The remaining interests in the vessel are not in question. It is

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admitted the other owners authorized the sale, and have [ \* 377 ] received their share of the purchase money. The \* case, therefore, is brought down to the single question, are the respondents chargeable with notice of this outstanding equitable interest in the vessel at the time of the purchase?

Our first remark is, that all the parties concerned in or connected with the purchase deny notice, and testify to the good faith of the transaction—Vanderbilt and Vail, who were concerned in the sale, and Deming and Todd in the purchase—four persons, each of unimpeachable characters.

This position is sought to be impaired by a critical examination of the testimony of Vanderbilt and Vail, who were examined on interrogatories, and isolated answers are seized on for the purpose of weakening the general denial, and establishing the fact of notice. We shall not go into the detail, but content ourself by stating that we have very diligently examined all the answers of these witnesses relied on in connection with the whole of their testimony on the subject, and they come to this—that the purchasers were advised there were parties in California who had advanced money towards building the vessel; that she was originally intended for employment in the waters of that State; that this purpose had been changed; and that they wished the boat sold, and that they, Vanderbilt and Vail, were authorized to sell her. Now this taken together furnishes neither notice of the equity of the estate of Van Pelt in the vessel to the purchasers, nor is it sufficient even to put them on inquiry. It must be recollected that the burden of proof rests upon the complainant. Taking the whole statement as true and entitled to belief, there is nothing in it to excite the apprehensions of even a prudent business man; for at the same time the purchasers were advised of advances or interests of persons in California, they were advised they had authorized the sale. One part of this statement was as much entitled to belief as the other. The case falls within the principle stated by Lord Lyndhurst in *Jones v. Smith*, (1 Philip, Ch. R. 244.)

It must be remembered that this was not a purchase under a power of attorney, and hence a necessity to look to the power and see to the authority.

The purchase was from the apparent owner, possessed of [ \* 378 ] all \* the indicia of property, and the question is, whether this evidence of ownership is overcome by notice of an outstanding equitable interest in the vessel. The affirmative rests with the party charging notice, and the facts brought home to the knowledge of the purchaser to charge him with notice must be

taken together, as the question is, what effect the evidence as a whole should have produced on his mind. Nor should it be forgotten that the persons who had advanced money to Vanderbilt had advanced it for the building of a vessel in his name and as his property.

The same observations are applicable to the testimony of Butler, a witness, who says, there appeared to be a question between the parties regarding the validity of the title to the boat; that Vanderbilt and Vail assured the purchasers that independent of being builders of the boat they were duly authorized by all the parties that might have any interest in her in California to sell her on the best terms. This witness does not profess to give the words of the parties, but only the substance of the conversation as he then recollected it.

The testimony of Spencer, who went to New York to become steward on the *Adelaide*, to the 12th interrogatory, says, "I understood from both Capt. Vanderbilt and Mr. Demming that John Van Pelt was part owner of the *Adelaide*;" and to the 15th he answered, "they (Vanderbilt and Demming) both told me that the *Adelaide* was built to go to California; Captain Vanderbilt said they had entered into a combination out there, and the *Adelaide* was not needed; that they had boats enough out there to do all the business, and that this was the reason why they sold the *Adelaide*."

Now, the fact that the boat was built for parties in California, and that they had come to the conclusion she was not needed there, and wished her sold, did not necessarily detract from the right or authority of Vanderbilt to sell, who was invested with the legal title. If she was intended for sale, the presumption would not be an unnatural one that he was thus invested for the very purpose of a sale. As to the testimony of Spencer, that he "understood from both Vanderbilt and Demming that John Van \*Pelt was part owner of the *Adelaide*." This is hardly [\*379] evidence in a court of justice. It is the inference of the witness from conversation, instead of the conversation itself. It is not the evidence of a fact; a charge of perjury could not be predicated upon it if false.

Wood, another witness relied on to prove notice, beside the indefiniteness of his testimony, the conversation occurred nearly four years after the transaction; after also litigation had sprung up concerning the claim of the estate of Van Pelt. The suit in question was then pending against the respondents, and was naturally the subject of conversation and very easy of misapprehension. This witness also seems to have been in frequent communication with one

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of the parties in the Van Pelt interest. As a specimen of his testimony—"I asked Demming, I think, how the boat came to be sold here, and I think Demming or Mayhew told me that a person by the name of Van Pelt owned her, who died in California. I don't know that he said Van Pelt owned her, but that owing to Van Pelt's death she was sold here."

This witness also says: "I understood from conversation I had with Demming and Mayhew that they had knowledge of the interest of Van Pelt or of that estate before the boat was purchased." We need not repeat this is not evidence. This is all the testimony on the question of notice that deserves any comment. We have seen that Van Pelt in his lifetime, and his legal representatives since his death, have studiously concealed their interest in this vessel in the city of New York, and for this purpose caused her to be constructed and finished in the name of Vanderbilt; and, after the appointment of another agent, Vail, to take charge of her after completion, the interest was still to be concealed in his name, thereby holding out a third person as the ostensible owner from the beginning of her construction, till the sale took place in August, 1854. And, although we do not say these parties who have thus enabled their agents to impose upon the purchaser should be estopped from setting up their interest as against him, if he purchases with knowledge, yet we think, under such circumstances, it is \* the duty of the court to scrutinize the evidence with more than ordinary attention—the proof of knowledge should be direct and unequivocal. The parties here seeking to prove the knowledge assume a position in contradiction to their past conduct, and are not entitled to the most favorable consideration of the court. They are endeavoring to charge knowledge of a fact upon third persons or the public, when their interests become concerned, which they had down to the sale industriously concealed.

Some observations have been made upon the circumstances under which the vessel left the port of New York for the East, as tending to impeach the good faith of the purchasers. The proofs on this subject leave no such impression on the mind of the court. The vessel had been purchased to fill a vacancy on a line of steamboats, and a delay of some ten days had occurred beyond the time fixed for her completion, which reasonably explains any impatience on the part of the purchasers in leaving for the city of Boston. Certainly, the fear of arrest can hardly be inferred from their anxiety, as the vessel was equally exposed to one in the latter city as in the former.

Without pursuing the case further we are satisfied that, upon a



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full examination of the proofs on the question of notice, they fail to impeach the *bona fides* of the purchasers, and as the legal title passed, the complainant has failed to establish any right to relief; and, we may add, we are not sorry that we have come to a conclusion in favor of the innocent party who has acted upon the evidence of the legal title of the party from whom the purchase was made against the other innocent party, who had not only been instrumental in furnishing this evidence, but has industriously concealed his own, and thus turned the equity of the case against him.

The decree below reversed.

Mr. Justice CLIFFORD, dissenting: I cannot concur in the opinion just pronounced; and inasmuch as the case is one of importance to the parties, I think it proper to state the reasons of my dissent. Appellee claims title to thirteen-twentieths of the \*steamboat described in the bill of complaint, as adminis- [ \* 381 ] trator of John Van Pelt, late of San Francisco, in the State of California, deceased. He was the complainant in the court below, and his claim is based, in the bill of complaint, upon the ground that the money to build thirteen-twentieths of the steamer was furnished by his intestate in his lifetime, or was paid out of his estate since his decease, to redeem certain personal property belonging to the estate which had been pledged by the decedent while in full life to furnish credits to construct and complete the steamer. Title to the whole steamer is claimed by the respondents in their answer by virtue of a purchase made by their agent on the 9th day of September, 1854, of one William W. Vanderbilt. John Van Pelt, on the 1st day of May, 1853, employed William W. Vanderbilt to make a draft for a steamer which he proposed to build in the city of New York, to be employed in navigating the waters of California. Vanderbilt made the draft as requested, and Van Pelt about the same time proposed to him that he should proceed to the city of New York as his agent, and there contract for and superintend the building of the steamer. Prior to that time he had been in the employment of Van Pelt as an engineer in navigating steamers on the waters of the former State. Connected, as Van Pelt was, with such navigation, he did not desire that it should be publicly known that he was about to build a steamer of the description mentioned to come to California; consequently, it was arranged between him and his agent that the latter should immediately proceed to the city of New York and make the contracts for the contemplated steamer in his own name, and Vanderbilt testifies that he was to enter the steamer, when completed, at the custom-house

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in New York as his vessel, unless he was otherwise ordered by his employer. According to the arrangement as then made the steamer, when completed, was to be sent to California and there wholly transferred to the principal, unless the agent should decide to become interested in her to the extent of two-twentieth parts as it was then contemplated he might do. Full proof is exhibited that

Van Pelt advanced \$20,000 to his agent towards the enter-  
[ \* 382 ] prise before any of the contracts were actually made \* for the building of the steamer; \$12,000 of that sum was advanced in the month of May, 1853, before the agent sailed for New York, and the balance was duly forwarded to the agent and received by him before any of the payments fell due under the construction contracts. On the 7th day of July, 1853, the agent made the contract with Lupton and McDiarmid to build the hull of the steamer for the sum of \$20,000; \$5,000 were to be paid when the keel was laid, \$5,000 when the vessel was in frame, \$5,000 when she was planked and her deck laid, \$2,500 when she was launched, and the balance of \$2,500 when the carpenter-work was finished. Separate and wholly independent contracts with other parties were made by the agent for the engine, joiner-work, and painting. Payments under all the contracts were to be made by installments "as the work progressed," and in all, except the one first mentioned, it was expressly stipulated that the work should be done to the satisfaction of Vanderbilt. Van Pelt wrote to him on the first day of September, 1853, directing that the steamer, when completed, should be registered as follows, to wit: ten-twentieths in the name of D. P. Vail, four-twentieths in the name of Richard Chenery, three-twentieths in the name of R. M. Jessup, two-twentieths in the name of William W. Vanderbilt, and one-twentieth in the name of Frank Johnson. Other correspondence took place between these parties which shows to a demonstration that Vanderbilt was merely the agent of Van Pelt in contracting for the building of the steamer, and that the original instructions in respect to the registry of the steamer were wholly superseded. When the enterprise was projected Van Pelt had expected to visit New York before the steamer was completed, but his health failing in September, 1853, he was obliged to abandon that intention, and for that and other reasons determined to make some new arrangement in respect to the steamer. Having come to that determination, he sent for Richard Chenery, who accordingly visited the decedent at Sonoma where he was then sick, and they made an arrangement in respect to the subject-matter of this controversy. Under that arrangement Chenery, for himself and R. M. Jessup, took seven-twen-

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tieths of the \*steamer, and it was agreed that he should [ \* 383 ] have the entire control of the business. Pursuant to that arrangement Chenery paid to Van Pelt seven-twentieths of the \$20,000 which the latter had already advanced to build the steamer, and by pledging property they procured a letter of credit on Page, Bacon & Company for an additional sum of \$50,000, to be expended in her completion. They also appointed D. P. Vail as their agent, and sent him to New York to adjust and pay the accounts and close up the concerns growing out of the building of the steamer. He took with him the letter of credit and proceeded to New York, but on the 29th day of the same September John Van Pelt died.

Administration was granted on his estate in California in October, 1853, and when closed, it appeared that there was \$70,000 for distribution among his heirs, exclusive of his interest in the steamer now in controversy. Thirteen-twentieth parts of the steamer were built from moneys advanced by John Van Pelt, or procured from credits furnished by him in his lifetime, as fully appears by the accounts adjusted and paid by his administrators, and duly presented and allowed in the probate court. \$48,194.57 were paid by his administrators to redeem the property pledged to procure the before-mentioned letter of credit, and the whole amount so paid by them was expended in the construction of the steamer. \$13,000 had been advanced by Van Pelt in his lifetime, as before explained, and the two sums exceed thirteen-twentieths of the cost of the steamer by more than a thousand dollars. Vail proceeded to New York, pursuant to his appointment as agent of Van Pelt and Chenery, but as all the contracts had been made in the name of Vanderbilt, he continued to superintend the completion of the steamer.

Contractors for the hull agreed to complete the same in four months from the seventh day of July, 1853, and the evidence shows that the hull was launched and delivered to Vanderbilt in December following. She was built in Green Port, and after being delivered, she was taken to New York, and in a few days after her arrival there, the proper contractors commenced to put in her engines. More than \$56,000 were expended in her construction and equipment, in addition to the sum of [ \* 384 ] \$20,000 paid to the builders of the hull. Builders of the hull were paid in full according to the contract, and they delivered the same to Vanderbilt in December, 1853, without reservation or condition.

1. Having received their pay in full, and delivered the vessel without reservation or condition, of course they retained no interest

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which they could afterwards convey to any one. They built the hull only, and never had any interest, title or claim, in the entire vessel, or in the \$56,000 expended for her completion after such delivery. Where an entire vessel is agreed to be built by a contractor, no property vests in the party for whom she is built until she is ready for delivery, and has been accepted or approved by such party. *Mucklow v. Mangles*, (1 Taun. 318;) *Stringer v. Murray*, (2 Barn. & Ald. 248;) *Merrit v. Johnson*, (7 Johns. 473;) *Abbott on Ship.*, p. 5.

But that rule does not prevail where the vessel is constructed under the superintendence of the party for whom she is built, or his agent, and payments for her, based upon the progress of the work, are to be made by installments, as the work is done. In such cases the person for whom the vessel is built is regarded as the real owner by all the well-considered decisions upon the subject. *Woods v. Russell*, (5 Barn. & Ald. 442;) *Atkinson v. Bell*, (8 Barn. & Cress. 227;) *Clarke v. Spence*, (4 Ad. & Ell. 448;) *Laidler v. Burlinson*, (2 Mee. & Wels. 602;) *Chitt. on Con.* (10th ed.) p. 401; *Andrews v. Durant*, (1 Ker. 40.) *Vanderbilt* acquired no title by the delivery of the steamer, for the reason that he furnished no money to pay the contractors, and in accepting the same he acted as the agent of those whose money was invested in the enterprise. He took no written conveyance at that time, and the whole evidence shows that he did not then contemplate any fraud upon the rights of those he represented in accepting the delivery. Builders never had any title, because the work had been performed under the superintendence of the agent, and by the terms of the contract the consideration was to be paid, and was in fact paid by installments, as the work was done.

2. Suppose it had been otherwise, however, it must still [ \* 385 ] be \*conceded, I think, that no title remained in the builders of the hull after the reception of the consideration, and the unconditional delivery of the steamer under the contract. Title, therefore, must have vested in those who furnished the means to build the vessel, unless it be held that it was in abeyance, which no one will assert. Assuming the facts to be so, then it is clear that the case falls within the rule that when an agent acquires property in his own name by the use of the funds of his principal, it thereby becomes the property of the principal by operation of law. *Scott v. Surman*, (Willes R. 400;) *Taylor v. Plummer*, (3 Maul & Sel., 574, 578;) *Thompson v. Perkins*, (3 Mason, 235;) *Story on Ag.*, sec. 231.

None will deny that title to a ship or vessel may be acquired by

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building or by purchase ; and it is equally clear that it may be established, especially when acquired in the former mode, without the exhibition of any bill of sale or other written evidence. Authorities in this country are abundant to show that the title of a vessel may pass by delivery under a parol contract. (*Bixby v. Franklin Ins. Co.*, (6 Pick. 86;) *U. S. v. Willings*, (4 Cran. 55;) *Badger v. Bank of Cumberland*, (26 Me. 428;) *Windover v. Hogeboom*, (7 Johns. 308; *Vinal v. Barret*, (16 Pick. 401;) *Leonard v. Huntington*, (15 Johns. 298;) *Thorn v. Hicks*, (7 Cow. 699; *Pars. Mer. L.* 329;) *Stacy v. Graham*, (3 Duer, S. C. 452;) *Lord v. Furgerson*, (1 Mason, 317.) Thirteen-twentieths of the steamer vested in the estate of John Van Pelt, in December, 1853, when the builders of the hull delivered the same to Vanderbilt.

3. When that delivery was made, Vanderbilt had no muniments of title whatever, and did not commence to procure them until the 7th of April, 1854, and, in the meantime, \$56,000, in addition to what had been paid for the hull, had been expended upon the steamer, and the estate of the complainants' intestate paid thirteen-twentieths of that sum to redeem the property, pledged by the intestate in his lifetime, as before explained. Attention to dates is important on this branch of the case, in order to ascertain when and by what means, if at all, Vanderbilt acquired what is called an apparent legal title. Importance \* must be attached to [ \* 386 ] the inquiry as to dates, because the opinion of the court admits in effect that the title in fact, as between the respondents' grantor and the legal representatives of the deceased, was in the estate of the decedent ; and it is difficult to see how the admission could have been withheld, as four months intervened after the builders surrendered all pretense of title before any writing of any kind was procured furnishing any color to any such ground of defense. When it is said that Vanderbilt had the apparent legal title, reference is made, I suppose, to the bill of sale from the builders of the hull, to their certificate as master carpenters, and to the enrollment of the steamer at the custom-house. These several papers, it seems, are regarded as constituting what is called an apparent legal title in Vanderbilt ; but if they do, it will be seen that they became such by a fraud as base and transparent as was ever perpetrated by a living man upon a dead man's estate. Bear in mind that Vanderbilt was virtually superseded when the new agent was sent to New York to settle the accounts and close the concerns. His subsequent services were rendered as a sub-agent under David P. Vail ; but, whether so or not, his agency under his first appointment terminated on the 29th of September, 1853, when John Van Pelt died.

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He then had no muniments of title, apparent or otherwise, and the whole evidence shows that he never became the agent of the heirs or legal representatives of Van Pelt's estate. To make up the supposed apparent legal title, his first step was to induce the builders of the hull to give him a bill of sale of the whole steamer. What inducements were held out to them to give the bill of sale does not appear; but it does appear that, on the 7th day of April, 1854—four months after they had delivered the hull without reservation or condition—they gave him a bill of sale of the whole steamer, in consideration of \$20,000, as therein expressed with covenants of general warranty applicable to the whole interest and value of the steamer. They generously conveyed not only what they built themselves, but all that was built by others, and warranted the whole to the grantee. Speaking of the sale of a ship, Chancellor Kent says

the general rule is that no person can convey who has no [ \* 387 ] title, and the mere fact of \*possession by the vendor is not of itself sufficient to give a title. 3 Kent Com., p. 130; *Williams v. Merle*, (11 Wend. 80.) Observe that the hull was unconditionally delivered by the builders four months before the date of this bill of sale, and it is very evident that after such delivery they retained no interest in the hull or any part of the vessel which they could convey to any one; and they never had any pretense of interest in the engine or the other materials added to the steamer between the time of the delivery and the date of their bill of sale. When that bill of sale was given, no builder's certificate had been filed in the custom-house; but on the 22d day of May following, the builders of the hull filed in the proper office a certificate in the usual form, certifying that the steamer had been built by them at Green Port, in 1854, and that William W. Vanderbilt was the owner. Such a certificate has the effect to show that the vessel was built in the United States, and that she is entitled to be registered as such, and it is required to be filed before the vessel can be registered or removed from the district where built to the district where the owner resides. Act Dec. 31, 1792, sec. 4, 1 Stat. at Large, 289.

4. Certificates given by master carpenters as a compliance with the registry acts are required for certain specified purposes, but they are not instruments of conveyance and cannot properly have the effect, or be so construed as to vest any interest in the person holding the same, as the owner of the vessel, beyond what he has by virtue of some other valid, legal title. Unless these two instruments, taken in connection with the attending circumstances, constituted a legal title in the grantor of the respondents, then it is clear that he had none such, because they are all the muniments of

title held by him on the 3d day of August, 1854, when he contracted to sell the steamer to Wm. Deming and Wm. Todd, the agents of the respondents who made the purchase. Conveyance of the steamer, however, was not made by him until the 9th day of September following, and on that day she was enrolled at the custom-house in his name. Doubts had arisen in regard to her title, and the purchasers and seller respectively employed counsel to make the title satisfactory \*at the custom-house, [ \* 388 ] which resulted in procuring an enrollment Saturday evening just before the custom-house was closed. Written notice in behalf of the legal representatives of John Van Pelt was given to the collector of New York on the 22d day of June, 1854, informing him that Van Pelt at his death was the owner of thirteen-twentieths of the steamer, and requesting that she might not be registered or enrolled, or any transfer of her entered at the custom-house without notice to them, but it does not affirmatively appear that the agents of the respondents had any knowledge of that paper. Registry acts are to be considered as forms of local or municipal institutions for purposes of public policy. They are imperative only upon voluntary transfers of the parties, and do not in general apply to transfers by act or operation of the law. 3 Kent. Com. 9th ed. 208. Of itself, the registry it is said is not evidence of property unless it be confirmed by some auxiliary circumstances to show that it was made by the authority of the person named in it, who is sought to be charged as owner. Without such proof, courts of justice have expressed strong doubts whether it was even *prima facie* evidence of ownership. *United States v. Brune*, (2 Wall. jr. p. 264;) *Tinkler v. Walpole*, (14 East, 226;) *Melver v. Humble*, (16 East, 169;) *Fraser v. Hopkins*, (2 Taunt. 5;) *Sharp v. United Ins. Co.*, (14 Johns. 381;) 1 Greenl. Ev. p. 494. Upon the same ground and for the same reasons it is competent for the real owner who claims as builder to show by parol evidence that his claim is well founded, and that the builder's certificate and registry or enrollment were fraudulently made and issued in the name of another. Such fraudulent acts cannot convey any interest in the vessel, and if not then a claimant whose title has no other foundation cannot convey a good title as against the real owner even to a purchaser without notice, because he cannot convey a title to that which he does not own. *Williams v. Merle*, (11 Wend. 80;) *Everett v. Coffin*, (6 Wend. 609;) *Prescott v. Deforest*, (16 Johns. 169.)

5. But suppose it to be otherwise, and that the legal title to the steamer was in Vanderbilt at the time he and Vail gave the bill of

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sale to the agent of the respondent, still the complainant, [ \* 389 ] \*as it seems to me, is entitled to recover in this suit on the ground that Vanderbilt held the title in trust for the legal representatives of John Van Pelt, and that the agents of the respondent had notice of the defect of title in their grantor. It is admitted that as between the legal representative of Van Pelt and the grantor of the respondents, the title to the steamer was in the former, so that the only question on this branch of the case is that of notice, but it is said that direct and unequivocal proof of notice must be required. Nothing is better settled than the rule that a purchaser with notice of a trust stands in no better situation than the seller, and it is equally well settled that notice to the agent is notice to the principal. *Com. Dig. Chan. 4, c. 5; Maddox v. Maddox*, (1 Ves. Jr. p. 62;) *Fulton Bank v. New York and Sharon Canal Co.* (4 Paige Ch. R. 127;) *Bank of Alex. v. Seton*, (1 Pet. 309.) Purchasers with notice are bound in all respects as their vendors were, and have no greater right. *Taylor v. Stibbett*, (2 Ves. Jr. p. 437.)

6. Until a different rule is established by this court, I must continue to hold that whatever puts a party upon further inquiry is sufficient notice in equity. Ordinary prudence is required of the purchaser in respect to the title of the seller, and if he fails to investigate when put upon inquiry, he is chargeable with all the knowledge it is reasonable to suppose he would have acquired if he had performed his duty. *Hill v. Simpson*, (7 Ves. Jr. 170;) *Kennedy v. Green*, (3 My. & Keen, 722;) *Com. Dig. Chancery, 4, c. 2; Smith v. Lowe*, (1 Atk. 489;) 3 Sug. on V. & P. 10th ed. 471; *Jones v. Smith*, (1 Hare, 43;) *Booth v. Barnum*, (9 Conn. 286;) *Pitney v. Leonard*, (1 Paige, Ch. R. 461;) *Carr v. Hilton*, (1 Cur. C. C. 390.) Constructive notice is held sufficient, upon the ground that when a party is about to perform an act by which he has reason to believe that the rights of a third person may be affected, an inquiry as to the facts is a moral duty, and diligence an act of justice. Hence, says Judge Duer, in *Pringle v. Phillips*, (5 Sand. S. C. R. 157,) he proceeds at his peril when he omits to inquire, and is then chargeable with a knowledge of all the facts that by a proper inquiry [ \* 390 ] \*he might have ascertained. *Hawley v. Cramer*, (4 Cow. 717;) *Williamson v. Brown*, (20 Law R. 397.)

7. Applying these principles to the present case, I am of the opinion that the evidence to show notice is full and complete establishing the fact beyond all reasonable doubt. Respondent's agents, Deming and Todd, were examined as witnesses, and they deny that they heard that any parties in California other than their grantor



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had any right or interest in the steamer, but the fact is proved to have been otherwise by six or seven witnesses, whose depositions are in the record. Their grantor, Vanderbilt, was examined as a witness, and the respondents asked him whether in the negotiations and interviews he represented himself as acting for any other person than himself, and he stated expressly that he represented himself as acting for himself, David P. Vail, "and the other owners." Responding to another interrogatory of a similar character, he said that he represented himself as acting for himself and parties in California who had advanced him money to build the boat, and as if to make it more emphatic and precise, he also said that he did state that parties in California had advanced him money to build the steamer Adelaide; and what is still more important, he also said that he so stated on board the Adelaide some time in August, 1854, and that they, the California parties, wanted the Adelaide sold to realize their money, as he had no other means of paying them. Communications so direct and specific could not have been misunderstood, and the occasion last referred to undoubtedly was the one when the respondent's agents went on board the steamer to examine her on the day the contract of sale was made. When the last interview took place Vail was out of town, but Vanderbilt says he informed the respondent's agents that Vail represented some parties in California who had advanced money. Some delay occurred in consequence of his absence, but he was sent for and joined in the contract; and Vanderbilt says that he represented to them the position he occupied; that he represented that he was acting as the agent of parties in California who had advanced money for the vessel; and in conclusion, the witness says: "I always told them there \*were parties in California who had ad- [\* 391] vanced money for the steamer, but I have no recollection of telling them the names of the parties."

Vail was also examined as a witness by the respondents. He says it was mentioned at the time that he represented owners in California, and that he consented to the sale by authority of instructions from Mr. Chenery to that effect. Deming and Todd, as the witness stated, understood from Vanderbilt and himself that the vessel was built for parties in California, and that the reason she was sold was because the business had changed there so that the boat was not wanted. We told Mr. Deming, says the witness, that we were acting for parties in California, who wished the boat sold; and we did state that the Adelaide was built for parties in California. Both of these witnesses were examined by the respondents, and it is safe to say—there is no ground to suspect them of any partiality for the

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complainant. Other witnesses were also examined upon the subject, on the one side or the other, whose testimony is equally explicit. Complainant examined Carlos P. Butler, who wrote the original agreement. He says that there appeared to be a question between the purchasers and the sellers in regard to the validity of the title to the boat. Sellers assured purchasers that, independently of being builders of the boat, they were duly authorized by any party or parties that might have an interest in her in California, to dispose of her on the best possible terms. Want of confidence was evidently felt and manifested in what is now denominated the apparent legal title. Assurances were given that the persons proposing to sell had authority to sell from the real owners; but they exhibited no power of attorney to represent absent owners, or to sell the interest of the complainant's intestate, and no inquiries were made upon the subject. Witness says doubts were expressed as to the power of Vail and Vanderbilt to convey a good title, but Mr. Deming said he was perfectly satisfied with their statement. Their statement was, that they had authority independently of being builders of the boat; but no such authority was exhibited and [ \* 392 ] no inquiries made in regard to it, \*although the witness states that it was spoken of by all that the steamer was built for parties in California.

Answer of respondent denies all such information, but the evidence proves it and falsifies the answer. Defense must rest where it is placed in the pleadings, and cannot now be shifted. Another witness, examined by the complainant, was John W. Marshall, who testifies that while Deming and Vanderbilt were negotiating on board the steamer, the latter said he wanted to see Captain Vail before he could do anything about selling the steamer, as he (Vail) had power to sell the boat; and the witness adds: Deming knew she was built for parties in California, as we talked about it before we came on. Reference should also be made in this connection to the deposition of John Spencer, who testifies that Vanderbilt and Deming both told him that the Adelaide was built to go to California to run on the Sacramento river; and he expressly states that he understood from both of them that John Van Pelt was a part owner in the Adelaide. Certain conversations between Deming and James Wood, who was examined as a witness, are also given in evidence by the complainant, to the effect that the former stated to the latter, in May, 1858, that the boat was built for parties in California; and the witness thinks that Deming, or the party who introduced him, stated that a person by the name of John Van Pelt, who died in California, owned the steamer. Complainant also refers to the con-

duct of Deming after the steamer was enrolled at the custom-house as tending to confirm the testimony, offered to show that he had knowledge that the title was defective, and, unless the ordinary rules of evidence are to be wholly disregarded, the circumstances proved are entitled to great consideration. Efforts to make the title satisfactory were not successful until Saturday evening, just before the time of closing the custom-house. While the negotiations for perfecting the title were going on, and only the day before they were closed, an agent of the heirs of John Van Pelt's estate arrived in the city of New York from California to look after this vessel. On his arrival he heard of the sale of the steamer, but having ascertained that she still remained at the wharf, and that she had not \*been enrolled or inspected, he applied to the sur- [ \* 393 ] rogate for administration on the estate. All this took place on Saturday; and that evening, after dark, Mr. Deming sent for Mr. Winchester, who had come on to take charge of the steamer as master, and directed him to have the smoke-pipe of the steamer painted that night, signifying at the same time that the steamer would sail on the following morning.

After his arrival in the city of New York, Winchester had acted as master of the steamer, but on Sunday morning William W. Vanderbilt took charge of her as master, and between seven and eight o'clock she sailed for Boston in a storm, when it blew so hard that she had to come to anchor at the mouth of the sound. Whether Deming knew the person who had arrived from California as the agent of the heirs does not appear, but it does appear that he was well known to the sellers of the steamer, and the circumstances afford strong ground to infer that the departure of the steamer was hastened as a means of discouraging further attempts to prosecute the claim. Taken as a whole, I am of the opinion that the evidence shows that the agents of the respondents had actual notice that the title of the sellers of the steamer was defective, and that she was built by moneys advanced by parties in California; but at all events I am of the opinion that they had constructive notice that their grantors were not authorized to make the sale; and it is incomprehensible to me how any one who will read the record can come to a different conclusion.

Decree of the circuit court, I think, should be affirmed.

Mr. Justice MILLER. I am of opinion that ten-twentieths of the steamboat *Adelaide* were owned by John Van Pelt in his lifetime, and that the legal title passed to his administrators in California.

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That no sale of that interest could be made by those administrators, by the law of California, without an order of court, and as no such order was made, there was no valid sale of that interest to defendants.

I have not been able to find anything in the case to take [ \* 394 ] the \* transaction between defendants and Vanderbilt out of rule of *caveat emptor*. I am of opinion, therefore, that the decree of the circuit court should be affirmed, except as to two-twentieths, which, I think, were the property of Vanderbilt, and one-twentieth, the property of Frank Johnson, which, with the other seven-twentieths held by Chenery, passed to defendants by Vanderbilt's sale.

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THE UNITED STATES, Appellants, v. GALBRAITH and others.

2 Black, 394.

CALIFORNIA LAND GRANTS.

The claim in this case was rejected in this court, after confirmation by the commissioners and the district court on the following grounds :

1. The alteration on the face of the grant of the date from the 12th of June, 1846, to 12th of February preceding.
2. The absense of any archive evidence of the grant, or of the approval of the departmental assembly.
3. The production of a certificate of the approval of this assembly, signed by the governor and his secretary, which it is conceded is a forgery or a falsehood, as the assembly had no session after the real date of the grant.
4. The want of proof of possession and cultivation, and the extreme probability that the grant was fabricated by Pico and Moreno after the overthrow of their power by the United States.

APPEAL from the district court for the northern district of California. The case had been here before in this court, and is reported in 22 How. 89, (3 Miller, 246,) when the decree of confirmation was reversed, and a new hearing in the district court on further evidence ordered.

That court again confirmed the grant, and from that decree the United States brings the present appeal.

*Mr. Black* and *Mr. Gillet*, for United States.

*Mr. Ashmun* and *Mr. Hill*, for appellees.

[ \* 401 ] \*Mr. Justice NELSON delivered the opinion of the court. This is an appeal from a decree of the district court of the United States for the northern district of California.

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The case presents a California land claim filed before the board of commissioners April 29, 1852, by the assignees of Juan N. Padilla, to whom the original grant as alleged was made of a tract of land containing five square leagues, 12th of June, 1846, situate in the department of Sonoma, and known by the name of "Balsa de Tomales."

The claim was confirmed by the commissioners, and on appeal by the United States to the district court the decree was affirmed. Afterwards an appeal was taken to this court, where the decree of the district court was reversed, and the cause remitted to that court for further testimony. The case will be found reported in the 22 How. p. 89.

This court, after referring to the grounds of objection to the claim, namely, the unsatisfactory proof of any possession or occupation of the tract, the alteration of the date of the original grant of the title in form, which was in the hands of the grantee and his assigns, and the questionable character of the certificate of approval by the departmental assembly produced by the \* claim- [ \* 402 ] ants, expressed the opinion, that, in consideration of the doubtful character of the claim and entire want of any merits upon the testimony, the decree below should be reversed and the case remitted for further examination. Since then much additional evidence has been taken by both parties before the district court, which court again affirmed the decree of the commissioners, and the case is now here on an appeal from that decree.

The espediente produced before the commissioners and court below contained the petition of Padilla, dated Monterey, 14th of May, 1846, the informe dated at Los Angeles, 20th of May, the certificate of Manuel Castro, that the land is vacant and grantable, dated at Monterey, 10th of May, and the title in form dated at Los Angeles, 12th of June following, the latter signed by Pio Pico, the governor, and Jose Matias Moreno, secretary. A certificate of the approval of the departmental assembly, signed by the same governor and secretary, dated at Los Angeles, 14th of June, same year, was also filed with the papers, together with the original grant which had been delivered to the petitioner, Padilla. This instrument is dated at Los Angeles, 12th of June, 1846, altered to 12th of February, of the same year.

The genuineness of the signatures of the governor and secretary to these evidences of title is proved by several witnesses, and, among them, by Moreno himself, the secretary. The fact upon the proofs cannot well be denied, and if there was nothing else in the case affecting the integrity of this title, we could concur with the

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court below in confirming it. But two objections are taken to these papers, which, in our judgment, have not been satisfactorily met or explained. The first is, that the certificate of approval by the departmental assembly is a fabrication. The records of that assembly, which are in good condition, prove the fact, and which is admitted in the brief of the counsel for the claimants. It was also so held by the court below. Now, the signatures of the governor and secretary to this certificate are proved to be genuine with the same strength of evidence as they are to the document of the [ \* 403 ] formal title. Moreno \*testifies with the same fullness to the signatures in the one case as in the other. The fabrication of this certificate, therefore, is not the work of a stranger or of a party interested, but of these functionaries themselves. As their signatures to it are genuine, these persons are necessarily implicated in the fraud, as the certificate could not have been fabricated without their participation. There is no escape from this conclusion. It might have been met by proof that their signatures were forged. This would have relieved them and the title from much of the suspicion and doubtful character resting upon the title, though not entirely, as the use of fraudulent papers by the claimant in support of a claim cannot but excite apprehension and caution. But no attempt was made to prove that these signatures were forged. On the contrary, every witness called and examined in respect to them testifies to their genuineness, and as we have seen, Morena himself, one of them.

This paper was regarded by the public authorities in California as well as by the petitioners for a grant of a portion of the public lands as very important in the perfection of the title. The grant in form by the governor, in express terms, is made "subject to the approval of the most excellent departmental assembly." Such is the condition annexed, according to the law of 1824, and the regulations of 1828. This court has dispensed with the condition in favor of these grants, which were in all other respects unobjectionable.

This paper, therefore, thus fabricated by Pico and Moreno while engaged in making the grant of the land in question to Padilla, cannot but connect itself closely with all the other documentary evidence of the title, especially that portion of it to which their names were essential, namely, the grant of the title in form.

Of the documentary evidence of title, under the Mexican laws, the approval of the departmental assembly was next in importance to the grant itself. If it must be admitted that these functionaries have been guilty of fabricating one of the documents to which their names are attached in making out the grant, what assur-

ance have we from the mere fact of the \*genuineness of [ \* 404 ] their signatures that they have not fabricated the other?

Dates of time and place afford no protection, as these can be fixed to the document at the will of the parties. This certificate of approval bears date city of Los Angeles, 14th June, 1846. But these could be fixed to the paper, if fabricated, at any time after it purports to bear date, as well as at the date itself. So as it respects the time and place fixed to the document of the formal title, which purports to have been made at the same place and on the 12th June, 1846. If fabricated, like the certificate of approval, the date or place affords no security of its genuineness. We have no record to detect the fraud, if committed, in respect to the title in form in this case as we have in many of these grants. The usual memorandum is made at the foot of the grant by Moreno, the secretary, as follows: "A note has been taken of this dispatch of the supreme government in the appropriate book."

Now, if a note of this grant had been found in the book of records, the Tomada razon, as it is called, of this date, as is certified by the secretary, it would have been entitled to great weight in relieving the title of much of the suspicion resting upon it. The counsel for the claimants insist that the proof furnished on this point, under the circumstances and condition of the country at the time, should be regarded as equivalent. The Mexican records of these grants which were at the city of Los Angeles in August, 1846, were placed by the governor in the keeping of one Vignes, in boxes, a short time before he fled from that place, which was on the 10th of that month. These archives came into the custody of Colonel Fremont, and were carried to Sutter's fort, and kept there till 1847, when they were removed to Monterey, and were placed in the charge of Mr. Hartnell, who made an index of the espedientes found among the archives, but not noted in any book. This grant to Padilla was found among them and indexed by Hartnell. Now, the argument is, that it must have been among the Mexican archives in the possession of Pico at the time he placed them in the hands of Vignes when he left the city of Los Angeles. This may be so. But Pico, Moreno, M. Castro, and Padilla, whose names are connected with \*the grant, were at the city of Los [ \* 405 ] Angeles from the 22d of July till the 10th of August, when they fled, within which time this grant could have been made and placed among the archives, and during which time the governor had no authority to make any grant. This government was in possession of the country as early as the 7th of July, 1846. It will be seen, therefore, that the fact of finding the espediente among

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the Mexican grants in the hands of Hartnell affords no evidence that it must have been made at its date. We agree, if it was not connected with the other document of title, an admitted fabrication, committed, if we believe the date, two days after the date of the grant, the above facts would be entitled to consideration. But, as we have seen, the fabrication of the grant was as practicable by these parties as that of the certificate of approval consistently with the fact of the deposit of the expediente among the archives at Los Angeles before their removal to Sutter's fort.

It is worthy of remark in this connection, that the certificate of approval and the title in form, both came from the hands of the claimants, and of course both had been delivered by the governor and secretary to Padilla, the grantee. They were filed before the board of commissioners on the 28th March, 1853, and no explanation in respect to the certificate was given or attempted, either before the board or the court below.

The next objection to the documentary evidence of title is the alteration of the date of the title in form from 12th June, 1846, to the 12th February preceding—the word February over the word June. The only attempt to explain this alteration is found in the testimony of Danglada, a witness for the claimants. He testified before the district court that the papers were delivered to him by Padilla, in the month of December, 1850, for the purpose of making a sale of the lands. That at this time they had been mortgaged by Luco, the owner, to Padilla, and both were interested in the sale. The witness acted as the agent of both. On his examination in chief he testified that the date of the paper was not altered when it came into his hands, nor while in them, and that the alteration must have been made afterwards. But, on cross-

[ \* 406 ] examination, his attention was called to a deed \*executed on the 1st March, 1852, by him, as attorney for others, of this tract, in which is recited the grant by Pico to Padilla as of the date of 12th February, 1846, and he was asked to explain this date, when he was obliged to admit that he might be mistaken. This is all the explanation that has been offered.

The case of the U. S. v. West's Heirs, (22 How. 315,) has been referred to as an instance of the confirmation of a Mexican grant which was subject to the imputation of a forgery in the alteration of the title in form. The alteration consisted in enlarging the grant of one and a half leagues to two and a half, "un sitio to dos sitios." The grant was made to West in 1840. He had been in the possession and occupation of the ranch from 1838 till 1849, when he died. Had made extensive improvements in buildings



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and cultivation ; among other improvements a grist-mill and cultivation of two hundred acres of grain and vegetables, besides a stock of two hundred horses and two thousand cattle. The case is not fully reported in the 22 How., and the above facts are obtained from the original record. The attorney general admitted the grant when made was genuine and honest, and that the only objection to it was the alteration. The papers, after the death of West, came into the possession of the widow and were necessarily intrusted to other hands for the purpose of procuring a confirmation. There was no evidence tending to prove that the alteration took place while in the hands of West, and taking the admission of the government that the original grant was genuine and honest, in connection with the possession and improvements, this court concurred with the court below in the confirmation of the league and a half. The features of that case upon the evidence were strikingly different from the present one.

There has been no possession or occupation in this case deserving of notice in aid of the title, or as evidence of any merit on the part of the grantee. Indeed, the weight of it is decidedly against a possession beyond that in common with the owners of other ranches in the neighborhood. The grant was made, according to its date, only twenty-five days before the United States took possession of the country. Padilla had a \* previous grant of the ranch Roblar de la [ \* 407 ] Miseria, in the same neighborhood, made on the 25th November, 1845, only a few months before the application for the one in question. Some of the witnesses confounded the occupation of this tract for that of the Balsa de Tomales. Another difficulty in the way of yielding our assent to the integrity of this grant is, that as early as the last of May or the first of June, 1846, Padilla was at Sonoma, or in that neighborhood, some five hundred miles from Los Angeles where this grant purports to have been made. He was at the head of a party of Californians in the disturbances which about that time broke out between them and the American settlers, and was charged with having participated in the murder of two of them. He fled about the middle of the month to the south side of the bay of San Francisco and joined the forces of Castro, the commander-in-chief of the Californians ; and, according to the evidence of Moreno, the secretary, he came down with Castro and met Governor Pico and party at Santa Margueretta, which was some one hundred and fifty miles below Monterey. Castro and Pico united their forces and passed on to Los Angeles, where they arrived on the 21st or 22d July, and remained till 10th August, when they fled south. It is clear Padilla could not have been at Los Angeles at the time the

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grant purports to be dated, and ground for strong doubt as to his being at Monterey May 14, at the date of the petition. All the parties to these documents of title, Pico, Moreno, M. Castro, and Padilla, were with the forces of Pico and General Castro at Los Angeles during the nineteen or twenty days they remained at that place. It was within their power to have made this grant while thus remaining together; and, as it is admitted that the certificate of approval of the departmental assembly was fabricated by two of them, we cannot but distrust upon all the evidence that the espediente, including all the papers relating to the title, was fabricated in the same way and at the same time.

Justices WAYNE, CATRON, GRIER, and MILLER dissented from the opinion of the court.

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KING, Plaintiff in Error, v. ACKERMAN.

2 Black, 408.

WILL—CONSTRUCTION OF A DEVISE.

Lawrence Benson, by his will, gave to his son, Benjamin Benson—1. The land occupied by George Williams, to do and dispose of as he might think proper; 2, the homestead of the testator; 3, he charged this devise with a legacy of \$1,500 to his grandchildren by a daughter; and 4, he gave his widow a life estate in all the lands during widowhood. Held:

1. That notwithstanding the words "to dispose of as he might think proper" in the first clause, and their absence in the second, they both vested a fee simple in remainder in Benjamin Benson.
2. That charging them both with a legacy tends to support that construction, which nothing in the language of the granting clause forbids.

WRIT of error to the circuit court for the southern district of New York. The case is stated in the opinion.

*Mr. Cutler* and *Mr. Black*, for plaintiff.

*Mr. O'Connor*, for defendants.

[ \* 414 ] \*Mr. Justice GRIER delivered the opinion of the court.

It has been an established rule, in the construction of wills, that a devise of lands, without words of limitation, confers on the devisee an estate for life only. This rule was founded rather on policy than on reason; for while it favored the heir-at-law, it generally defeated the intention of the testator. This is acknowledged by Lord Mansfield in *Loveacre v. Blight*, (Cowper;) and the interference of modern legislation, to abolish the rule and establish

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a contrary one, is evidence of the correctness of his remark. This change has been effected by statute in England and most if not all of the States of this Union.

The will now presented for our consideration was made before this obnoxious rule was repealed in New York, and we are compelled to examine its provisions fettered by this technical, artificial, and now nearly obsolete rule of construction. Courts have always been astute in searching for some equivalent \*popular [\* 415] phrase, or some provision of the will incompatible with such imputed intention, to rescue it from the effect of this rule. Thus, when a testator devises land without legal words of limitation, but adds that the devisee "may sell or do therewith as he pleases," he is presumed to have intended to give a fee, because such a power would be incompatible with a less estate. It is a long settled rule also, that where a devisee, whose estate is undefined, is directed to pay the testator's debts or legacies, or a specific sum in gross, he takes an estate in fee. The reason on which this rule is founded is, that if the devisee took a less estate he might be damaged by the determination of his interest before reimbursement of his expenditure. This rule, though founded on inference or implication, is nevertheless as technical and rigid in its application as that to which it is an exception; for the court will not inquire into the relative value of the land and the charge; or, if the charge be contingent, will not weigh probabilities as to whether the devisee will ever be called on to pay it. The intention of the testator as to the limitations of an estate devised can be judged and decided only from his own language as contained within the "four corners" of his will. Parol evidence cannot be received to show that such inference was not founded on probability, or that this rule of construction ought not to apply under certain circumstances. This would in effect be delivering the power and duty of construing the will to a jury.

The will of Lawrence Benson is very brief and is as follows:

*"In the first place,* I give and bequeath unto my son, Benjamin L. Benson, all that estate now occupied by George Williams, to do and dispose of as he may think proper.

I also give and bequeath unto my son, Benjamin L. Benson, the homestead where I now live, situated on Harlem river.

*Secondly.* My will and intention is, that my son, Benjamin L. Benson, do give unto my grandchildren, after the decease of my wife, the sum of \$1,500.

*Thirdly.* The income of these legacies, and also of my estate, real

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and personal, I give unto my loving wife, Maria Benson, [ \* 416 ] \*during her widowhood, to do and dispose of as she may think proper."

It is plain that this instrument has been written by a person "*inops concilii*," and wholly ignorant of proper legal phraseology.

He uses the term "bequeath" instead of "*devise*" in the gift of his real estate.

By the first clause he gives his two pieces of real estate to his son Benjamin, who appears to be the chief object of his bounty.

By the second, he charges the sum of \$1,500 on Benjamin to be paid to the grandchildren of testator.

By the third, he gives to his wife a life estate on all of his estate, real and personal, to be forfeited if she marry again.

Now, we must observe,

1st. That the son has clearly but an estate in remainder in the lands devised to him.

2d. That it is a vested remainder.

3d. That this testator not only postpones the possession and enjoyment of the land devised to his son for an indefinite time, but charges him with the payment of a gross sum of money, which he will be personally liable to pay, for land which he may never personally possess or enjoy.

If the charge is sufficient in law to give the devisee an estate in fee by implication or presumption, how much stronger is this presumption when his enjoyment of it is indefinitely postponed.

But it is contended, that, because the testator has used the phrase "*to do and dispose of as he may think proper*," as regards the Williams' farm, and in the devise of the homestead has omitted it, such omission as to the latter is equivalent to an express limitation of it to the life of the devisee; and that the court ought to presume that the sum to be paid was intended as a consideration for the first only; and if they will not presume it for want of evidence of its sufficiency, that parol evidence ought to be admitted to show the value of the Williams' property to have been more than sufficient to pay the sum plainly charged on both.

Now there is no established rule of construction that [ \* 417 ] if a \*testator having devised two messuages to his son and charged the devisee with the payment of legacies that if he add this informal power as to one, it is equivalent to an expressed limitation as to the other. Nor is it a necessary inference or logical conclusion, arising from the omission to use certain informal words, which have been construed to show an intention to give a fee as to one, that the testator did not intend to give a fee in the

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other of the messuages charged. Besides, it is clear that Benjamin could not repudiate his obligation to pay the legacies by refusing to accept the gift of the Williams' farm, while he retained that of the homestead. To conclude, therefore, from this fact that the testator did not intend to give a fee in both, would be mere conjecture, and that, with no sufficient reason to support it.

The face of this will shows that the testator did not suppose these informal words, giving a power to sell as to one, were necessary to enlarge the estate to a fee, much less that their omission would limit the devise of the other to a life estate, for he adds the same power to the life estate given to his wife.

If we were to indulge in conjecture, why this phrase was coupled with one of the estates devised and not with the other, it would be, that the testator intended to confine the charge of the legacies to to the "homestead" and not to the Williams' farm, or that he wished the one to remain in the family and name, while the son should be at full liberty to dispose of the other as he might think proper.

The rule of law which gives a fee, where the devisee is charged with a sum of money, is a technical dominant rule, and intended to defeat the effect of the former rule which itself so often defeated the intention of the testator.

Courts have always been *astute*, as we have said, to find reasons for rescuing a will from the artificial rule established in favor of the heir-at-law, and will not even be *acute* in searching for reasons to restore its force, where the statute has not abolished it. We are not compelled to make this inference or implication through submission to any established rule of construction; on the contrary, we are required to make an exception to one on \*mere con- [ \* 418 ] jecture, and to introduce parol testimony as to value to justify a departure from it. A court may look beyond the face of the will where there is an ambiguity as to the person or property to which it is applicable, but no case can be found where such testimony has been introduced to enlarge or diminish the estate devised.

We are of opinion, therefore, that Benjamin L. Benson took an estate in fee in both messuages described in the will.

The judgment of the circuit court is therefore affirmed with costs.

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THE CITY OF CHICAGO, Plaintiff in Error, v. ROBBINS.

2 Black, 418.

RIGHTS OF A CITY AGAINST A CONTRACTOR FOR WHOSE DEFAULT THE CITY HAS BEEN  
MADE TO PAY.

1. A municipal corporation is liable for injuries received by an individual by reason of the unsafe condition of the streets of which it has control.
2. It has a remedy also against the individual whose fault it was that the street was left in that condition.
3. Such a person so liable is bound by the verdict of the jury and judgment of the court against the city, if he had an opportunity to defend the suit, and failed to do so. Express notice of the suit and request to defend it are not necessary to bind him.
4. But this does not estop him from showing that it was not through his fault the injury occurred, but does bind him as to the amount, if on trial he is found liable at all.
5. The owner of the lot on which the injury occurred cannot relieve himself from liability for its dangerous condition by any agreement with the contractor who puts up a building for him. His obligation to keep his property in safe condition for the use of the streets cannot be thus evaded.
6. Notwithstanding the adoption of a different rule by the State courts where the trial took place, as it is a question to be determined by the common law, in a matter which has not become a rule of property, this court is not bound by the decisions of the State court.

WRIT of error to the circuit court for the northern district of Illinois. The case is stated in the opinion.

*Mr. Anthony*, for plaintiff in error.

*Mr. Fuller*, for defendant.

[ \* 419 ] \*Mr. Justice DAVIS delivered the opinion of the court.

This is an action on the case brought by the city of Chicago against Robbins. The suit was originally commenced in the Cook county court of common pleas, one of the State courts of Illinois. It was transferred, in pursuance of the act of congress on the petition of Robbins that he was a citizen of New York, to the circuit court of the United States for the northern district of Illinois, where there was a trial by jury on the 10th day of April, 1860, on the plea of not guilty, and the issue found for Robbins. There was a motion for a new trial, which was overruled by the court, and on the 28th day of May, 1860, judgment was entered on the verdict of the jury. The decision of circuit courts on motion for new trials is not subject to review, and this case is here on exceptions taken to the charge of the judge to the jury.

The declaration alleges: That the plaintiff is a corporation by the laws of Illinois, having exclusive control over the public streets,

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and bound to protect them from encroachment and injury.

\*That Robbins was the owner of a lot on one of the public [ \*420 ] streets, and wrongfully excavated in the sidewalk next to and adjoining his lot, an area of great length, width, and depth, and wrongfully suffered the same to remain uncovered and unguarded, so that one William H. Woodbury, on the night of the 28th of December, 1856, while exercising reasonable care and prudence in passing along the street, fell into it and was greatly injured. That Woodbury brought suit against the city, in said Cook county court of common pleas, and at the June term, 1857, of the said court recovered a judgment for \$15,000 and costs, which the city has been forced to pay, and that although the city is primarily liable, yet Robbins is responsible over to it for the amount of judgment, interest, and costs so recovered. The case as shown by the bill of exceptions is *this*: Robbins, owning a lot in Chicago, on the southeast corner of Wells and South Water streets, on the 20th of February, 1856, contracted in writing with Peter Button to erect a building thereon, which included an excavation of the sidewalk next to and adjoining it, so as to furnish light and air to the basement. The contract contained a stipulation that Button was to be liable for any violation of city ordinances in obstructing streets and sidewalks, or accidents resulting from the same. Possession of the ground in order to erect the building, was given to Button, by the terms of the contract, on the 1st day of April, 1856. The area was dug early in the spring, and covered up temporarily with joists, which often got displaced, and during the summer and fall it was frequently uncovered and dangerous. The flagging was laid some time in the fall and the iron gratings afterwards, with which Button had nothing to do.

There were seven different contractors on the building, in all, on different parts of the work. Letts had the contract for the iron gratings, and Cook & Co. for the flagging. Robbins was in Chicago, and occasionally at the building during the summer, and was there while excavations were going on, and was spoken to frequently by the city superintendent upon the dangerous condition of the area. At one time after flagging was laid, and ice was or had been on the flagging, he called Robbins' \*attention to the [ \*421 ] condition of the area, and suggested the mode in which it should be covered up, "telling him that if it was sleety and people were passing rapidly they might slip in, and that somebody's neck would be broken, if the covering was not attended to," and he replied "that he would see to it, but that the matter was in the hands of his contractor, and he would speak to him about it." Before this, the head clerk in the office of the city superintendent wrote

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Robbins a note and put it in the post-office, notifying him of the danger of the whole front of the sidewalk. The area was usually entirely open after flagging was laid, until after the grating was all done, and was open until after the accident. There were lamps at bridges, and a lamp at alley, sixty-four feet from the building. The width of sidewalk, including area, was sixteen feet. The area was four feet ten inches wide. The grade of Wells street was changed by the corporation; the sidewalk was raised eight inches higher than it was, to accommodate it to the grade of the street; it was raised in July or August 1856, and Robbins directed Van Osdell, his architect, to raise the sidewalk to the grade. Van Osdell superintended the erection of the building for Robbins, who paid him; his duty as superintendent was to see that the work was done according to contract; to see "that the work and material were according to specification, and make estimates." Button was told of the dangerous condition of the area, and spoke several times to his foreman about it. Button was to furnish his work under the contract by the 1st of September, but did not in fact complete it until February, 1857. On the night of the 26th of December, 1856, the area was not sufficiently covered, and Woodbury fell into it and was injured, and sued the city and recovered in manner as stated in the declaration. Marsh was city attorney in 1856, and when the suit was begun, he made preparations for its defense, and ascertaining that Robbins owned the building applied to him to assist him in procuring testimony. Robbins told him of a witness who knew something of the suit, and promised to write to him, and afterwards informed Marsh that he had done so. The evening before the trial he casually met Robbins and told him that the suit would be tried [ \*422 ] the next \*day; he did not go expressly to notify him to defend the suit, and never notified him that the city would look to him for indemnity. Evidence was given tending to show that the city authorities knew of the excavation of this area, and of other areas similar to this at different times, and interposed no objection, though no express permission to make this one was given.

The defendant introduced in evidence the following provision of the ordinances of the city of Chicago, viz.:

"ARTICLE II—OBSTRUCTIONS. CHAPTER LIII, SECTION 1.

*"Be it ordained by the Common Council of the City of Chicago, That no porch, galley, stoop, steps, cellar door, stair railing, or platform, erected or to be erected within the city, shall be allowed to extend into or upon any sidewalk where the street is less than*



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seventy feet in width, more than four feet; nor more than five feet, where the street is seventy feet and upwards in width. Any violation hereof shall subject the offender to a penalty of twenty-five dollars, and to the like penalty for every day such violation shall continue, after notice from the marshal or street commissioner of the proper division to remove the same."

It also appeared in evidence, that the original ordinance from which the foregoing provision is taken, was passed May 3d, 1855, but, as then passed, did not allow of more than four feet encroachment upon the sidewalk in any case. On the 7th of February, 1856, the ordinance was amended by the city council to read as above.

Is Robbins, under the law and evidence, answerable over to the city for the judgment recovered by Woodbury?

It is well settled that a municipal corporation having the exclusive care and control of the streets, is obliged to see that they are kept safe for the passage of persons and property, and to abate all nuisances that might prove dangerous; and if this plain duty is neglected, and any one is injured, it is liable for the damages sustained. The corporation has, however, a remedy over against the party that is in fault, and has so used the streets as to produce the injury, unless it was also a wrongdoer. If it \*was [ \* 423 ] through the fault of Robbins that Woodbury was injured, he is concluded by the judgment recovered, if he knew that the suit was pending and could have defended it.

An express notice to him to defend the suit was not necessary in order to charge his liability. *Barney v. Dewey*, (13 John. p. 226;) *Warner v. McGany*, (4 Vt. 500;) *Beers v. Pinney*, (12 Wend. 309.)

He knew that the case was in court; was told of the day of trial; was applied to to assist in procuring testimony; and wrote to a witness, and is as much chargeable with notice as if he had been directly told that he could contest Woodbury's right to recover, and that the city would look to him for indemnity.

Robbins is not, however, estopped from showing that he was under no obligation to keep the street in a safe condition, and that it was not through his fault the accident happened. It is insisted, that inasmuch as Robbins had no express permission from the city to encroach on the street, that he was engaged in an unlawful work, and the digging of the area was in itself a nuisance. So far as the city impliedly could give authority to make this area, it was given. The corporation undoubtedly knew that this area was in process of construction, and that many similar ones had been built since the grade of the city was raised, and yet no objection was ever inter-

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posed. Areas, like the one in controversy, are convenient to the owners of adjoining buildings, and useful in affording light and air, and if during their construction they are properly guarded and protected, they are no essential hindrance to the public in their right of transit over the streets. The public have a right to the free passage of the streets, and yet that right cannot always be enjoyed. Improvements could not be made in a large city; houses could not be built, or repaired even, without the streets being at some time obstructed. In *Commonwealth v. Passmore*, (1 Serg. & Rawle. 217,) the supreme court of Pennsylvania say: "It is true that necessity justifies actions which would otherwise be nuisances. It is true also that this necessity need not be absolute; it is enough if it be reasonable. No man has a right to throw wood or [ \* 424 ] stones into the street at pleasure. But inasmuch \* as fuel is necessary, a man may throw wood into the street for the purpose of having it carried to his house, and it may lie there a reasonable time. So, because building is necessary, stones, brick, lime, sand, and other materials may be placed in the street, provided it be done in the most convenient manner." "But these encroachments on a street must be reasonable, not continued longer than is necessary, and must be properly guarded and protected so as to secure the public against danger, and if these things do not concur, then they become nuisances and can be abated." *Clark v. Fry*, (8 Ohio State Reports, 359.)

Was the building of this area a necessary encroachment on the street; and if so, were the proper steps taken to secure it so as to protect the public from injury? The fact that an improvement may become dangerous, and involve great hazard, is no argument against the propriety of making it. If by great care, and more than ordinary diligence, it can be made, and the public saved from harm, and it is also necessary, then the right to make it is solved. The grade of the city was doubtless raised to secure light and air to basements, to get good cellars, and for purposes of drainage. The value of property in a city is much enhanced by the erection of solid and durable buildings, and every proper facility to perfect them should be given to builders. If it is necessary, in order to make a better building to occupy the sidewalk and dig an area, and it can be occupied, and the area dug and secured without danger to the public, then the encroachment made on the street is reasonable, and the work lawful. But in every improvement like the one we are considering, it is essential that every possible precaution should be used against danger. No precaution whatever was used in this case. The area was left uncovered, without guards and lights to warn

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those who passed by, and a serious accident was the result. If an area is left open it is dangerous, and is a nuisance, and can be abated. *Dygett v. Schenck*, (23 Wend. 446;) *Congreve v. Morgan & Smith*, (18 N. Y. 84;) *Storrs v. City of Utica*, (17 N. Y. 108;) *Coupland v. Hardingham*, (3 Campbell, 398.)

The city must be reimbursed unless it has been itself in fault. The rule of law is, that one of two joint wrongdoers cannot have \*contribution from the other. It is difficult in [ \* 425 ] this case to see how the city was to blame, and least of all how Robbins can impute blame to it. Robbins desired to erect a large storehouse, and to add to its convenience, wished to excavate the earth in the sidewalk in front of his lot. Without express permission from the city, but under an implied license, he makes the area. No license can be presumed from the city to leave the area open and unguarded even for a single night. The privilege extended to Robbins was for his benefit alone, and the city derived no advantage from it, except incidentally. Robbins impliedly agreed with the city, that if he was permitted to dig the area, for his own benefit, he would do it in such a manner as to save the public from danger, and the city from harm. And he cannot now say that true it is you gave me permission to make the area, but you neglected your duty in not directing me how to make it, and in not protecting it when in a dangerous condition. If this should be the law, there would be an end to all liability over to municipal corporations, and their rights would have to be determined by a different rule of decision from the rights of private persons. Because the city is liable primarily to a sufferer by the insecure state of the streets, offers no reason why the person who permits or continues a nuisance at or near his premises should not pay the city for his wrongful act. The city gave no permission to Robbins to create a nuisance. It gave him permission to do a lawful and necessary work for his own convenience and benefit, and if, in the progress of the work, its original character was lost, and it became unlawful, the city is not in fault. We can see no justice or propriety in the rule, that would hold the city under obligation to supervise the building of an area such as this.

But the defendant maintains "that the owner of a lot who employs a competent and skillful contractor (exercising an independent employment) to erect a building on his lot, is not liable to third persons for injuries happening to them by reason of the negligence of such contractor in the prosecution of the work," and that this area was not such a nuisance as rendered him liable. How far owners of real estate, or personal property, \*are an- [ \* 426 ]

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swerable for injuries which arise in carrying into execution that which they have employed others to do, has been a subject much discussed in England and this country since the case of *Bush v. Steinman*, 1 Bos. & Pul. 404. All the cases recognize fully the liability of the principal where the relation of master and servant, or principal and agent exists; but there is a conflict of authority in fixing the proper degree of responsibility where an independent contractor intervenes. We are not disposed to question the correctness of the rule contended for by the defendant as an abstract proposition. The rule itself has, however, limitations and exceptions, and we cannot see that it is applicable to this case.

"If the owner of real estate suffer a nuisance to be created, or continued, by another on or adjacent to his premises, in a prosecution of a business for his benefit, when he has the power to prevent or abate the nuisance, he is liable for an injury resulting therefrom to third persons." *Clark v. Fry*, (8 Ohio State Rep. 359;) *Ellis v. Sheffield Gas Consumers' Co.*, (2 Ellis & Black, 75 Eng. C. L. p. 767.)

This area when it was begun was a lawful work, and if properly cared for, it would always have been lawful; but it was suffered to remain uncovered, and thereby became a nuisance, and the owner of the lot, for whose benefit it is made, is responsible. He cannot escape liability by letting work out like this to a contractor, and shift responsibility on to him if an accident occurs. He cannot even refrain from directing his contractor in the execution of the work so as to avoid making the nuisance. A hole cannot be dug in the sidewalk of a large city and left without guards and lights at night, without great danger to life and limb, and he who orders it dug, and makes no provision for its safety, is chargeable, if injury is suffered.

It is said that Robbins did not reserve control over the mode and manner of doing the work, and is not therefore liable; but the digging this area necessarily resulted in a nuisance—was the result of the work itself—unless due care was taken to make the area safe.

This is a clear case of "doing unlawfully what might [\* 427] be done lawfully; digging earth in a street without taking proper steps for protecting from injury." *Newton v. Ellis*, (85 Ellis & Black, 58 Eng. C. L. 123.)

"If the owner of real estate builds an area in front of his store, he must at his peril see that the street is as safe as if the area had not been built." *Congreve v. Morgan & Smith*, (18 N. Y. 84.)

The privilege of making the area was a special favor conceded to Robbins alone, as the owner of the lot, and "it is a familiar princi-

ple that when one enjoys a privilege in consideration that he alone can enjoy the benefit, he is required to use extraordinary care in the exercise of that privilege." *Nelson v. Godfrey*, (12 Illinois, 20.)

Robbins, in the exercise of his privilege, did not use even ordinary care. There is no provision in his contract with Button, nor with the men who laid the flagging, or put on the iron grating, that they should provide proper lights and guards. What Button failed to do, by which he is chargeable with negligence, does not appear in the evidence. And Robbins, although repeatedly warned, and having daily supervision over the work by his architect and superintendent, suffers this nuisance to be continued. A case of grosser negligence could hardly be imagined. In the heart of a large city, the owner of a valuable lot, being desirous of adding to the value of a large iron building that he is about to erect by the license (to be inferred, not expressed) of the corporation, digs an area; leaves it open, without guards or lights; fails to provide with his contractor for the very matter which, if left undone, would make it a nuisance; is told of the dangerous condition of the area; has a direct supervision over it by his superintendent, and yet, when an injury is suffered by the very nuisance which he has created for his own benefit, and continued, insists that he is not in fault; that if blame attaches anywhere, it is to his contractor. If the owner of fixed property is not responsible in such a case as this, it would be difficult ever to charge him with responsibility.

In the cases which were cited by the defendant's counsel, and relied on, was the case of *Hilliard v. Richardson*, (3 Gray, 349,) \* and the case of *Scammon et al. v. The City of Chi-* [\* 428] *cago*, (25th Ills. 424.)

*Hilliard v. Richardson* was a most elaborate and able discussion of the *respondeat superior*, and the authorities in this country and England were fully reviewed, and we see no reason to question the conclusion at which the court arrived. But that case and the one at bar were not at all alike. That was a case where the owner of a building contracted with a carpenter at an agreed sum to repair it, and a teamster, who was employed by the carpenter to haul boards, left them in the street in front of the lot and an accident happened. The teamster, when he placed boards in the street, was engaged in a work collateral to that which the owner contracted for—the repair of the building—and in no sense can the injury be said to happen from the doing of that defectively which the owner directed to be done. The owner was correctly not held liable, and one of the grounds on which that court place their decision was, “that it was

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not a nuisance erected by the owner of the land, or by his license, to the injury of another."

The case of *Scammon v. The City of Chicago*, is similar in many of its facts to this case, and is decided differently. That court held, as we do, that if the "nuisance necessarily occurs in the ordinary mode of doing the work, the occupant or owner is liable; but if it is from the negligence of the contractor or his servants, then he should alone be responsible." But the court also held that "the omission to cover the opening in the area did not necessarily occur as an incident to the prosecution of the work," a rule to which we cannot assent, and which we think is opposed by reason and authority.

It was urged at the bar that this court, in such cases, follows the decision of the local courts.

Where rules of property in a State are fully settled by a series of adjudications, this court adopts the decisions of the State courts.

But where private rights are to be determined by the application of common law rules alone, this court, although entertained [ \* 429 ] \* ing for State tribunals the highest respect, does not feel bound by their decisions.

Testing the question of the correctness of the charge of the judge of the circuit court to the jury, by the rules and principles we have discussed and established, was there or not error in it?

The following language was used by the judge in his charge, and was excepted to by the city: "If, then, the contractors were in possession and control of the premises, with their servants and agents, and were, in their employment, independent of the defendant at the time of the accident, and the defendant was not concerned personally in the negligence which caused it, it follows, from what has been said, that he could not be held responsible for it." This instruction in a case where the facts warranted, might have been properly given. But it did not arise out of the facts of this case; was inapplicable to them; was calculated to confuse and mislead the jury on the question of Robbins' liability; and must have misled them, and should not have been given.

A broad rule was laid down, when the very case itself furnished an exception.

Robbins' duty was absolute to see that the area, dug under his direction and for his benefit, should be safely and securely guarded, and failing to do so, his liability attached, and the jury should have been told so.

The city also excepted to so much of the said charge of the court

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as leaves the question of joint negligence on the part of the plaintiff and defendant to the jury.

The city was not in fault, and this exception was properly taken.

The judgment below is reversed, with instructions to award a *venire de novo*.

Justices NELSON and MILLER dissented.

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E. B. WARD, Appellant, v. CHAMBERLAIN and others.

2 Black, 430.

ADMIRALTY DECREE—LIENS ON LANDS.

1. Whenever, by the laws of the State, the judgments or decrees of the State courts are liens on real estate, the judgments and decrees of the courts of the United States sitting in that State are liens under similar circumstances.
2. A decree of the district court of the United States sitting in admiralty operating against the parties *in personam* comes within this principle.
3. Where an execution has been levied upon real estate, which issued from the district court on a decree in admiralty, a bill on equity by the plaintiffs in the execution will lie to remove and ascertain doubtful incumbrances which are impediments to a fair sale of the land, as in case of execution at common law.

THIS was a bill in chancery in the circuit court for the northern district of Ohio, which was heard before the judges of that court on a general demurrer. On this hearing they were divided in opinion on points which they certified to this court, and which are stated in the opinion.

*Mr. Newberry*, for complainants.

*Mr. Spaulding*, for defendants.

\*Mr. Justice CLIFFORD delivered the opinion of the court. [ \* 432 ]

This is a bill in equity, and the case comes before the court on a certificate of division in opinion between the judges of the circuit court of the United States for the northern district of Ohio. According to the transcript the bill of complaint sets forth that the complainants, on the 12th day of November, 1856, upon appeal from the district court of the United States, obtained a decree in the circuit court for the southern district of Ohio for the sum of \$36,000 against the two respondents first named, in a proceeding by libel, filed in the district court on the 27th day of October, 1852, for damages sustained, as alleged in the libel, by means of a collision on the waters of Lake Erie, between the steamer Atlantic, belonging to the libelants, and the propeller Ogdensburg,

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belonging to the aforesaid respondents, whereby the steamer was sunk and lost. Complainants also allege that the case was taken by appeal to this court, and that the decree of the circuit court was here affirmed; that on the 7th day of July, 1859, when the mandate of this court was received and filed in the circuit court, a joint decree, by the agreement of the parties, was entered there against the original respondents and their sureties on the appeal to this court; that the parties to the last-named decree stipulated [ \* 433 ] and agreed between themselves that the \*original respondents should make certain payments at stated times on account of the decree, and that if such payments were regularly and punctually made, no execution should issue on the decree, but that they also stipulated and agreed that in default of any such payment as required by the agreement, the complainants might thereupon proceed to collect the amount due and unpaid as they should see fit.

They also allege that two payments of \$1,000 each were duly made under the stipulation and agreement, but that the aforesaid respondents subsequently made default, and when a second default had occurred, the complainants caused execution to issue upon the last-named decree against the goods and chattels, lands and tenements of the respondents in that decree, and delivered the same to the marshal, and that the marshal, finding no goods or chattels of the execution debtors, and for want of such, levied the execution upon certain parcels of land belonging to them, situated in the northern district of Ohio, and which are particularly described in the bill of complaint. Rights and interests in, and liens upon the lands are claimed by the other respondents, as the complainants allege, in regard to which they, the complainants, are not particularly advised; and they also allege that the respondents owned the lands levied upon and described in the bill of complaint at and before the time of the rendition of the first-named decree, and have so owned the same ever since that time, and that they have no other lands or tenements in the State, and have no goods or chattels liable to execution.

Prayer of the bill of complaint is for discovery, and that the rights of the parties and the dates and validity of their several liens in respect of the lands may be ascertained, and that the lands may be sold and the proceeds applied so far as can of right be done, to the payment of the amount due upon the decrees and for general relief. To the bill of complaint the respondents in the decrees demurred and the complainants joined in demurrer, thereupon the following questions of law occurred before the court, in regard to which the opinions of the judges of the court were opposed:



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\*1. Whether either of the decrees was a lien upon the [ \*434 ] real estate of the respondents therein who owned such real estate as aforesaid.

2. Whether an execution can be issued upon a decree in admiralty in Ohio against the lands of the respondents, they having no goods and chattels liable to execution to satisfy the same.

3. Whether the issuing and levying of the execution in this case, as aforesaid, were not nullities, and whether the levy of the execution in anywise bound the lands upon which the same was levied.

4. Whether real estate can be reached by proceedings in chancery to satisfy a decree in admiralty in Ohio, where the respondent has no goods or chattels liable to execution.

1. Provision is made by the act of the 29th of April, 1802, that whenever any question shall occur before a circuit court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement may happen, shall, during the same term, upon the request of either party or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the supreme court at their next session to be held thereafter, and shall by the said court be finally decided. 2 Stat. at Large, 156. Such certificate, as has repeatedly been held by this court, brings nothing before this court for its consideration but the points or questions certified, as required by the 6th section of the act. Defective certificates are sometimes sent up, but in such case the court uniformly refuses to certify any opinion, and remands the cause for further proceedings, holding, under all circumstances, that nothing can come before this court, under that provision, except such single definite questions as shall actually arise and become the subject of disagreement in the court below, and be duly certified here for decision. *Ogle v. Lee*, (2 Cran. 33;) *Perkins v. Hart's Exr.*, (11 Whea. 237;) *Kennedy et al. v. Georgia State Bank*, (8 How. p. 611.) All suggestions, therefore, respecting any supposed informality in the decree, or irregularities in the proceedings of the suit, are obviously premature and out of place, and may well

\*be dismissed without further remark; because no such [ \*435 ] inquiries are involved in the points certified, and by all the decisions of this court matters not so certified are not before the court for its consideration, but remain in the court below to be determined by the circuit judges. *Wayman v. Southard*, (10 Whea. 21;) *Saunders v. Gould*, (4 Pet. 392.) Such other matters, undoubtedly, may be brought here for revision by another certificate of division in an opinion like the present, or by an appeal after

final judgment, but nothing of the kind is here now for the consideration of the court.

II. Recurring to the questions certified in the transcript, it is obvious that the first three involve the same general considerations, and present the important inquiries—1. Whether a decree in admiralty for the payment of money, rendered in a federal court, in a suit *in personam* under the circumstances stated, is a lien upon the lands of the respondents in the decree, and, if so, then—2. Whether an execution issued on the same may, for the want of goods and chattels of the execution debtor, be lawfully levied on his real estate. Libelants, under the 21st rule in admiralty, adopted at the last session of this court, may have a writ of execution in the nature of a *feri facias* in all cases of a final decree for the payment of money, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the defendant or stipulator. Execution, however, was issued upon the decree described in the bill of complaint in 1860, before the present rule was adopted, and while the old rule adopted in 1845 was in operation. By that rule it was provided that the libellant might, at his election, have an attachment to compel the defendant to perform the decree or a writ of execution in the nature of a *capias* and of a *feri facias*, commanding the marshal or his deputy to levy the amount thereof of the goods and chattels of the defendant, and for want thereof to arrest his body to answer the exigency of the execution. Authority was given to the courts of the United States, by the 17th section of the judiciary act, to make and establish all necessary rules for the orderly conducting of business in the said courts, provided [ \* 436 ] \*such rules were not repugnant to the laws of the United States; and by the 17th section of the act of the 2d of March, 1793, additional authority was conferred upon the several courts of the United States to make rules and orders for their respective courts, directing certain prescribed proceedings, and other matters in the vacation, and otherwise in a manner not repugnant to the laws of the United States, and to regulate the practice of said courts, respectively for the advancement of justice, and to prevent delays in the proceedings. 1 Stat. at Large, pp. 83, 335.

Full power and authority were also given to this court by the 6th section of the act of the 23d of August, 1842, to prescribe, regulate, and alter the forms of writs and other process to be used and issued in the district and circuit courts, and the forms and modes of framing and filing libels, bills, answers, and other pleadings and proceedings, in suits at common law, or in admiralty and

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in equity, pending in those courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and of proceeding to obtain relief, and of proceeding before trustees appointed by the court, and generally to regulate the whole practice of the said courts so as to prevent delays and promote the other objects specified in the section. 5 Stat. at Large, 518. None of those provisions, however, authorize this court to adopt rules making judgments or decrees for the payment of money a lien on land where no such charge is created by law, or to displace any such right where the same is conferred or recognized by an act of congress. Remarks are to be found in the opinion of the court in *Beers et al. v. Haughton*, (9 Pet. 360,) which give some countenance to that theory, but the remarks were not necessary to the adjudication of the matter in controversy, and evidently should be understood as referring to the examples previously mentioned in the opinion of the court, where process had been modified to make it conform to State laws adopted by rule of court. Congress, say the court, may adopt such State laws directly or by substantive enactment, or they may confide the authority to adopt them to the courts of the United States; and the judge who delivered \*the [\* 437] opinion, in enforcing the proposition, went on to say that the courts may by their rules not only alter the forms, but the effect and operation of process, both mesne and final, so that it may reach property not before liable, or may exempt property previously subject to such process.

Explained as above, the remarks are perhaps without objection, but it cannot for a moment be admitted that any rule adopted by this court, merely as such, can enlarge, diminish, or vary the operation and effect of mesne or final process upon the property of the debtor in respect to the matter under consideration. Although a lien on land constitutes no property or right in the land itself, still it confers a right to levy on the same to the exclusion of other adverse interests acquired subsequently to the judgment, and when the levy is actually made on the land affected by the lien, the title of the creditor generally relates back to the time of the judgment, so as to cut out intermediate incumbrances. *Conrad v. The Atlantic Ins. Co.*, (1 Pet. 443;) *Massingill v. Downs*, (11 How. 767.) Different regulations, however, prevail upon the subject in different jurisdictions, and in some of the States neither judgments nor decrees for the payment of money, except in cases of attachment on mesne process, create any preference in favor of the creditor until the execution issuing on the same has been duly levied on the land. Reference is made to these various regulations as confirming the

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proposition that rules of court can have no effect to create such a right, or to displace it where it has been conferred by the legislature.

III. Two errors, as was supposed, existed in the old rule, and it was on that account that it was abolished and the new one was substituted in its place. Arrest of the body of the debtor was improperly allowed, and the remedy of the creditor against the property of the debtor was improperly restricted. 5 Stat. at Large, pp. 321, 410; 4 Stat. at Large, 281. Repeal of the old rule corrected one of the supposed errors, and the new rule was adopted to correct the other, so that the practice of the admiralty courts upon both subjects might conform to the existing provisions of law. Such were the views of the court at the time the alteration was [ \* 438 ] made in the rule, but it is insisted by the \*respondents that decrees in admiralty, although rendered in suits *in personam* and for the payment of money, are not in any case a lien on land under the laws of congress. They do not deny that judgments and decrees in equity, for the payment of money, are a lien on land in the State of Ohio; nor that, by the laws of congress, such judgments and decrees in the federal courts follow in that respect the laws of the State in which the same were rendered or pronounced.

Argument in support of the first proposition is certainly unnecessary, because it is the subject of express legislation. Code, sec. 421; Swan's Stat. 675. Laws to that effect were passed at a very early period in the history of the State, and they appear to have been continued to the present time. Repeated decisions of this court also have established the doctrine, that the lien of judgments and decrees in the federal courts arises out of the adoption of the State laws upon that subject, and that the lien may be considered as a rule of property under the thirty-fourth section of the judiciary act. *Clements v. Berry*, (11 How. 411;) *United States v. Morrison*, (4 Pet. 124;) *Ralston v. Bell*, (2 Dall, 158.) To the same effect, also, is the decision of Mr. Justice Grier, in *Lombard v. Bayard*, (1 Wall, jr., 96,) wherein he held: "1. That the lien of judgments in the courts of the United States does not result from any direct legislation of Congress on that subject. 2. That under the judiciary act, which ordains that the laws of the several States shall be the rules of decision at common law, the courts of the United States" have uniformly adopted the principles of State policy and jurisprudence on the subject of the lien of judgments, so far as the same were applicable, treating them as rules affecting real property, and its transmission, whether by descent or purchase.

Regarding those propositions in the form first stated as settled and undeniable, nothing remains for consideration on this branch of the case except to inquire and ascertain whether or not decrees in admiralty for the payment of money stand upon the same footing as decrees in equity ; for if they stand upon the same, then it is clear that the first three questions must be \* answered [ \* 439 ] in the affirmative, and if not, then they must be answered in the negative.

4. Expressions are to be found in one or more of ~~the cases~~ referred to which countenance the idea that ~~the State~~ laws in respect to the ~~lien of judgments and~~ decrees were adopted by the courts of the United States, but upon a closer examination of the subject it will appear, we think, that those laws are recognized and substantially adopted by the acts of congress regulating process in the courts of the United States. Authority was given to all the courts of the United States by the 14th section of the judiciary act to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. Provision was also made by the 2d section of the act of the 29th of September, 1789, that the forms of writs and executions, except their style and modes of process, should be the same in each State, respectively, as were then used or allowed in the supreme court of the same ; but it was provided that the forms and modes of proceedings in causes of equity and admiralty and maritime jurisdiction should be according to the course of the civil law. Power to issue process, mesne and final, was conferred upon all the courts of the United States by the first provision, but the forms of process in suits at common law and the forms and modes of proceedings in equity and admiralty and maritime causes were prescribed by the second. Discrimination was made between suits at common law and suits in equity and admiralty, but the forms and modes of proceedings in the two latter were referred to the civil law. Expiring, as the last-named act did, at the end of the next session after which it was passed, further legislation became necessary, and congress accordingly passed the act of the 8th of May, 1792, confirming the forms of writs, executions, and other process then used in the courts of the United States in suits at common law, but declaring, in effect, that the forms and modes of proceeding in suits of equity, and in those of admiralty and maritime jurisdiction, should be according to the principles, rules, and usages \* which belong [ \* 440 ] to courts of equity and to courts of admiralty, respectively, as contradistinguished from courts of common law. Certain excep-

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tions are specified in the same section, and the whole provision is made subject to such regulations as the supreme court of the United States shall think proper, from time to time, by rule, to prescribe to any circuit or district court concerning the same. (1 Stat. at Large, 276.)

Two cases at least came before this court involving the construction of that provision and its validity. Those cases among other things affirm: 1. That the States have no authority to control or regulate the proceedings in the courts of the United States, except so far as the State process acts are adopted by congress, or by the courts of the United States under the authority of congress. 2. That the foregoing provision adopted the forms of writs, executions, and other process of the States as existing in 1789, subject to such alterations as the courts of the United States might make, but not subject to alterations since made in the State laws. 3. That the laws of the United States authorize the courts of the Union so to alter the form of the process of execution then used in the State courts as to subject to execution lands and other property not then subject to execution by the State laws in force at that time. *Wayman v. Southard*, (10 Wheat. 41, 43;) *Bank of U. S. v. Halstead*, (10 Wheat. 63.) In enforcing the third proposition, Mr. Justice Thompson in the last case said it is understood that it has been the general, if not the universal, practice of the courts of the United States so to alter their executions as to authorize a levy upon whatever property is made subject to the like process from the State courts, and under such alterations many sales of land have no doubt been made which might be disturbed if a contrary construction should be adopted. Both of those cases were decided in 1825, and at the same term this court held, in the case of *Manro v. Almedia*, (10 Wheat. 490,) that the proceedings in cases of admiralty and maritime jurisdiction, under the before-mentioned process act, were to be according to the modified admiralty practice of our own country, and that it was not a sufficient objection to the issuing of the process [ \* 441 ] of attachment \* that it had fallen into disuse in the parent country. Such was the state of the decisions of this court when the act of the 19th of May, 1828, was passed. 4 Stat. at Large, 278. Regulation of mesne process is the subject of the first section, commencing with the forms of mesne process in suits at common law in the courts of the United States held in those States admitted into the Union since the date of the first process act. Forms of mesne process in those courts are required to be the same in each of the said States respectively "as are now used in the highest court of original and general jurisdiction of the same."

Separate provision is also made in the same section in respect to the forms of mesne process in proceedings in equity and in those of admiralty and maritime jurisdiction. Repetition of those regulations is unnecessary, as they are substantially the same as those of the former act, except that the regulations relate solely to mesne process. Right of imparlance also is made, by the second section of the act, to depend in certain cases upon State laws. Where judgments are a lien upon the property of the defendant, and where, by the laws of the State, defendants are entitled in the courts thereof to an imparlance of one term or more, the provision is that the defendants in actions in the courts of the United States, holden in such State, shall be entitled to an imparlance of one term, showing that it was the intention of congress to prevent a creditor suing in the federal courts from obtaining an advantage over another creditor suing in the State courts. Bearing in mind that the first section of the act under consideration has respect solely to the forms of mesne process in the several courts of the United States, and that the provision specifies and prescribes the source from which the forms of such process shall be derived in suits of admiralty and maritime jurisdiction, as well as in suits at common law and in equity, we come to the examination of the third section of the same act, which provides that *writs of execution* and other final process issued on judgments and decrees rendered in any of the courts of the United States, and the *proceeding thereupon* shall be the same, except their style, in each State, respectively, as are now used in the courts of such State, saving to the courts of the United States \* in [\* 442] those States in which there are not courts of equity, with the ordinary equity jurisdiction, the power of prescribing the mode of executing their decrees in equity by rules of court.

Courts of justice may construe a legislative provision, but they cannot repeal what is expressly enacted. When congress, in plain and unambiguous terms declares that writs of execution on decrees rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same as are now used in the courts of such State, it is not possible for this court to hold that the decrees of one of the courts of the United States are not embraced in that provision; especially not, as the very court whose decrees it is said are excluded from the provision is specifically mentioned in the first section of the same act as one of the courts of the United States, and its proceedings there made the subject of special and material regulation. Exclusive original jurisdiction in admiralty and maritime cases is conferred upon the district courts of the United States, but the circuit courts hear such cases on appeal, and, as matter of

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daily practice, render decrees thereon for the payment of money; and it is not to be doubted, we think, that such decrees are as much within the provision under consideration as decrees in equity; and if so, no reason is perceived why the same rule should not be applied to decrees of a like character rendered in the district courts. Undoubtedly congress intended by that provision to adopt the State laws in respect to the proceedings on final process as they existed at the date of the act, and the effect of the enactment, or one of its effects, was to render judgments and decrees for the payment of money rendered in the federal courts a lien on the land of the debtor in all cases and under like circumstances as when rendered in the courts. Under the earlier process acts this court twice decided that the laws of the States furnished the rule of decision in respect to the lien of judgments and decrees rendered in the federal courts upon the land of the debtor, and since the passage of the act under consideration it has been twice affirmed by this court as a matter of history that the act was passed to confirm the view expressed in those decisions. *Beers et al. v. Haughton*, (9 Pet. 361;) *Ross et al. v. Duval*, 13 Pet. 64.)

[ \* 443 ] \* Perfect coincidence of opinion upon the subject appears to have prevailed throughout between congress and the court, and on all sides apparently the endeavor has been to assimilate the proceedings in the federal courts for the levying of executions issued on judgments and decrees for the payment of money to those prevailing in the courts of the States. Strong confirmation as to the views of congress upon the subject is derived from the 4th section of the act of the 4th of July, 1840. 5 Stat. at Large, 393. By the fourth section of that act it is provided, that judgments and decrees hereafter rendered in the circuit and district courts *within any State*, shall cease to be liens on real estate or chattels real in the same manner and at like periods as judgments and decrees of the courts of such State now cease by law to be liens thereon. District courts, as is well known, exercise no jurisdiction in equity; so that the inference is a very strong and indeed a conclusive one, that the reference to decrees, so far as that court is concerned, is solely to decrees in admiralty for the payment of money.

Imprisonment for debt also and the computation of interest upon judgments in all civil cases, both in the circuit and district courts, are by acts of congress expressly referred to the laws of the State for the rule of decision and the ascertainment of the rights of the parties. 5 Stat. at Large, pp. 320, 410, 515. Usage, however, it is said, is opposed to such a construction of the provisions under consideration, and reference is made to authorities to show that in



England an execution issued on a decree in the admiralty never runs against the land of the debtor, which may well be admitted, but the reason for the restriction must not be overlooked, which is, that courts of admiralty in that country are not regarded as courts of record. Under the constitution, the judicial power of the United States is vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. Such judicial power extends to all cases of admiralty and maritime jurisdiction, as well as to the cases of law and equity described in the constitution.

When the judicial system of the United States was organized, \*exclusive original cognizance of all civil causes [ \* 444 ] of admiralty and maritime jurisdiction was conferred upon the district courts. Appeals in certain cases were allowed to the circuit court, but neither an admiralty or an equity cause could be brought here from the circuit court in any other mode than by writ of error. 1 Stat. at Large, 83. Later regulations allow appeals, but they place causes in equity, and admiralty and maritime jurisdiction, upon the same footing. 2 Stat. at Large, 244.

Circuit courts, as well as district courts, were created by the act of congress establishing the judicial system of the United States, and the latter as well as the former are courts of record. No one ever doubted the fact, and consequently it is not necessary to enter into any argument to prove it. These considerations lead necessarily to the conclusion that the answer to the first three questions must be in the affirmative.

5. Before proceeding to answer the fourth question submitted, it becomes necessary to advert very briefly to the state of facts bearing upon the point as exhibited in the transcript. Execution was issued on the decree in favor of the complainants, and the marshal duly levied the same upon the several parcels of land described in the bill of complaint. They are, therefore, interested in the title to the subject-matter in controversy, and inasmuch as the statement of the case shows that rights and interests in and liens upon the lands of a conflicting character are claimed by the other parties, they, the complainants, were entitled to the discovery and to so much of the relief prayed for as has respect to the ascertainment and determination of the rights and interests of the parties and the dates and validity of their liens upon the said lands. Equity will not allow a title to real estate, otherwise clear, to be clouded by a claim which cannot be enforced either at law or in equity, and consequently will interfere in behalf of the holder of the legal title to remove a cloud on the same, or an impediment or difficulty in the

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way of an effectual assertion of his rights in a court of law. Such interference cannot be sustained unless the complainant show some title or interest in the land; but it makes no difference [ \* 445 ] whether such \*title or interest was acquired by the levy of an execution issued on a judgment at law, or on a decree in equity or admiralty for the payment of money. Complainant's rights and remedies are precisely the same as they would have been if the execution levied on the land had been issued on a judgment at law or a decree in equity for the payment of money. Jurisdiction in equity to remove a cloud from the title of the complainant is fully maintained by the modern decisions of the courts, and so generally is the principle acknowledged, that all doubt upon the subject may be considered as put at rest. 1 Story Eq. (8th ed.) secs. 700, 705; *Hamilton v. Cummings*, (1 John. Ch. R. 522; *Pettit v. Shepherd*, (5 Paige Ch. R. 501.)

Where the respondents claimed an unfounded lien on certain real estate of the complainant, and it appeared that such claim prevented purchasers of the estate from making payment of the stipulated price, it was held in *Chipman v. Hartford*, (21 Conn. 488,) that the complainant was entitled to a discovery and to have the cloud removed from his title; and, in enforcing that conclusion, the court say that where an instrument is outstanding against a party which is void, or an unfounded claim is set up, which he has reason to fear may at some time be used injuriously to his rights, thereby throwing a cloud over his title, it is a well-recognized principle that equity will interfere and grant the appropriate relief. *Downing v. Wherin*, (19 N. H. 91;) *Tanner v. Wise*, (3 P. Wms. 296;) *Overman v. Parker*, (1 Hemp. 692;) *Clark et al. v. Smith*, (13 Pet. 203;) *Lounsbury v. Purdy*, (18 N. Y. 515.) Applying these principles to the present case it is clear that the complainants were entitled to a discovery and to have the cloud removed from their title, but equity will not interfere under the circumstances stated, to decree that the lands shall be sold and the proceeds applied as prayed in the bill of complaint. Affirmative answers must be certified to the first three questions, and to the fourth, that the complainants, under the demurrer, are entitled to so much of the relief prayed for as has respect to the removal of the cloud upon their title to the land described in the bill of complaint, but that the real estate mentioned cannot be reached by proceedings in chancery to satisfy the aforesaid decree.

[ \* 446 ] \*Mr. Justice GRIER, dissenting.

I feel bound to express my dissent from the majority of my brethren in the opinion just delivered.

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It is now seventy years since the establishment of courts of admiralty in these States, yet it seems that the boundary line of their jurisdiction is not yet settled. During all this time it has never been supposed that the definitive sentence or decree of a court of admiralty was a lien or could be levied on lands. The dominion of the admiral was over the sea—the ships and men who frequented it—their contracts and their torts. His court proceeded either against the ship or the person of the owner, by arrest of the thing or the person. When either was arrested, they could be released by entering into stipulation with approved sureties (*fide jussoux*), who consented that execution should issue against their goods and chattels in case of default.

There is no process known to courts of admiralty for seizing or selling land. But it is said that this process is authorized by the process act of March 19, 1828.

It is now thirty-five years since that act was passed, and now for the first time, it has been alleged that this provision lay hid within its sections. The twenty-first rule regulating the practice in admiralty, made by this court in 1845—seventeen years after the passage of the act—shows that this court had then no suspicion of the hidden meaning of the third section, which has now been brought to light. If they had supposed that this statute had made lands subject to lien by the decree of a court of admiralty, they would have devised some process for taking them in execution and selling them. The first section of the act ordains that the forms of mesne process, &c., should be the same in courts of common law as are used in the highest courts of original and general jurisdiction of the States; and in equity according to the rules and usages which belong to courts of equity; but “in those of admiralty jurisdiction, according to the principles, rules, and usages of admiralty as contradistinguished from courts of common law.”

The third section, which directs process of execution, speaks \* of judgments and decrees in any of the courts of [ \* 447 ] the United States, and ordains that it shall be the same except in their style, as now used in the courts of such State. Now as there are no courts of admiralty in any State, to what rule was the process of courts of admiralty to conform? Is it to those of these courts of common law or equity? The act provides that in States where there are no courts of equity, the process may be prescribed by rules of court.

The whole argument of this new construction of this section is founded on the word “*any*,” which is construed in its most expan-

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sive sense, in spite of consistency in the act, and the evident intent of the legislation, as exhibited in the whole statute.

This innovation in the jurisdiction of admiralty courts introduces a lien unknown to the laws of any State.

The lien of judgments is a rule of property, which it is beyond the power of this court to establish. Congress has been careful not to attempt the exercise of such a power; and only adopts the State rules in cases where, if the judgments or decrees had been in a State court, they would have operated as a lien. Congress never intended by this oblique way, to create, what would in fact be, (to a large portion of every State,) secret liens.

I believe that the construction which this act has received for thirty-five years past is the true one, and beg leave to protest against this introduction of a new one, which utterly disregards "the principles, rules, and usages of courts of admiralty as contradistinguished from a court of law."

I am confident such was not the intent and meaning of congress. The result of this doctrine may be, to bring us into conflict with the State courts, who may refuse to recognize titles to land obtained through the process of maritime courts.

Mr. Justice CATRON joined with Mr. Justice Grier in the dissent. The other judges concurred in the opinion of Mr. Justice CLIFFORD.

THE TRUSTEES OF THE WABASH AND ERIE CANAL COMPANY, Appellants,  
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2 Black, 448.

EQUITY—STATUTORY LIENS ON THE CANAL.

1. The loans contracted for the benefit of the Wabash and Erie Canal Company by the State of Indiana, under the several acts of her legislature of the years 1832, 1834, and 1836, by which acts the canal and its revenues were pledged for the payment of these loans, are liens on said canal and its revenues, with priorities according to the dates of these respective statutes.
2. These loans and the liens created by those statutes are contracts within the meaning of that word in the federal constitution; and it was not in the power of the legislature of Indiana to repeal or impair these obligations.
3. Nor did the legislature of Indiana intend, by anything found in the act of January 19, 1846, and the supplementary act of 1847, by which the State made propositions for settlement with her creditors, to deny or impair the obligation of those liens and their respective priorities as here declared.
4. The option given by these acts to accept the certificates of the State under that act in lieu of any class of those liens, was a purely voluntary matter on the part of the creditor; and his acceptance of the State's offer as to one class of obligations did not work a waiver or forfeiture of any obligation he might hold of another class.

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5. Nor was he under any such relation to other creditors of the State that it was inequitable in him to accept the State's offer as to bonds with insufficient or doubtful security, and retain his lien as to other bonds when he thought his security sufficient.
6. But when a party who holds two bonds out of two hundred, secured by a first lien on the canal, brings his suit in behalf of himself and other bondholders of the same class who are not named, it is error to decree a sale of the property for those two bonds and make no provision for the rights of the other outstanding bondholders.
7. For this latter reason the decree is reversed, with directions to enter a decree providing for all the bondholders of that class, with a reference to a master to inquire who they are, and, if unknown, to advertise for them to come in and share in the proceeds of the sale on paying their due proportion of the costs of the litigation.

THIS is an appeal from the circuit court for the district of Indiana. The case is very fully stated in the opinion.

*Mr. Usher*, for appellants.

*Mr. Gillet*, for appellee.

\* Mr. Justice MILLER delivered the opinion of the court. [\* 448]

This is an appeal from a decree of the circuit court of the United States for the district of Indiana.

The government of the United States having granted to the State of Indiana certain lands to aid in the construction of a canal, designed to unite the waters of Lake Erie with those of \* the Wabash river, that State caused the route to be sur- [\* 449] veyed and located, and an estimate to be made of the cost of construction, which was calculated at the sum of \$1,081,970.

On the 7th day of January, 1832, an act was passed, which approved and adopted this survey and estimate, established a board of canal commissioners, and authorized them to borrow the sum of \$200,000, to be used in making said canal. The fifth section of this act is as follows: "That for the payment of the interest, and redemption of the principal of the sums of money which may be borrowed under the authority of the general assembly, for the construction of said canal, to the extent of the estimated cost thereof, in the first section of this act stated, there shall be and are hereby irrevocably pledged and appropriated all the moneys in any manner arising from the lands donated by the United States to this State, for the construction of said section of said canal, the canal itself, with the said portion of land thereto appertaining, or as much thereof as will realize by sale the sum borrowed, and all privileges thereby created, and the rents and profits thereof belonging to the State, and the net proceeds of tolls collected on said canal, or any part thereof, as finished; the sufficiency of which for the purposes aforesaid, as above allowed and provided for, the State of Indiana doth hereby irrevocably guaranty."

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Under this act there were issued two hundred bonds for one thousand dollars each, two of which are held by complainant in this suit; and the decree which was rendered in his favor, was for the interest due and unpaid on them.

In 1834, the legislature authorized another loan of \$400,000, for the benefit of the canal, for which the act again pledged the canal and the lands granted by the federal government, and the State guarantied the sufficiency of the security.

In 1835, by another act, the legislature contracted a third loan of \$227,000, for the benefit of the canal. But for this it did not pledge the canal, but only the faith of the State.

In 1836, a law was passed providing for a general system of internal improvement, which authorized the State to borrow ten millions of dollars, for which sum, in gross, she pledged [ \* 450 ] her \* canals, railroads, turnpikes, and the tolls and water rents arising from them; and by the tenth section of that act an additional loan of \$500,000 was authorized for the benefit of the canal, for which the canal, its lands and resources, were again pledged as security.

Of some one of these later loans, probably the ten million loan, as they are called internal improvement bonds, the plaintiff became the owner of thirteen bonds, of \$1,000 each.

Under the pressure of the large debt contracted by this last act, and of the general financial distress which followed shortly after it was created, the State found herself unable to pay the interest on her bonds, her credit seriously impaired, and her citizens weighed down with heavy taxation. In this state of her affairs, she came forward in 1846 with a proposition to her creditors, which is to be found embodied in the act of January 19th, 1846, and the supplementary act of January 27th, 1847.

The principal features of these acts, so far as they concern our present purpose, are, that the bonded debt of the State, except its bank stock bonds, should be equally divided between the State and the Wabash and Erie Canal; that the bonds then out should be surrendered, and in place of them the holders should receive one-half in State stock certificates, bearing five per cent. interest; and for the other half, Wabash and Erie Canal stock certificates, bearing the like rate of interest. For the security of the payment of the latter, the act provided that the entire canal, its lands, revenues, and property of every description, should be conveyed to trustees, whose powers and duties were therein prescribed. As a means of completing the canal and rendering it productive, the parties who surrendered their bonds and received stock certificates in lieu

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thereof, were required to pay ten per cent. on the amount of the new certificates for that purpose. For this the act also gave them a lien on the canal and its revenues in the hands of the trustees. These statutes were not to take effect until \$4,000,000, which was about half of the bonds of the State, were surrendered; and the canal was not to be transferred to the trustees until \$800,000 had been subscribed by holders of certificates for its completion. The \*creditors of the State generally accepted this [ \* 451 ] arrangement. The necessary amount of bonds was surrendered to give effect to the act, and the necessary sum was subscribed to authorize the transfer of the canal to the trustees. The plaintiff surrendered his thirteen bonds of the issue of the act of 1836, and paid his subscription of ten per cent., but he did *not* surrender his two bonds issued under the act of 1832, nor does it appear that any bonds of that issue were surrendered.

It is claimed by counsel for appellant, that \$981,970 of bonds of the *same class* of the two retained by plaintiff were surrendered. This is founded on the idea, that of the bonds issued under the acts of 1834, 1835, and the 10th section of the act of 1836, so many are to be considered as entitled to the security provided by the act of 1832 as will make up with the \$200,000 first issued, the estimated cost of the work mentioned in the latter act. It is difficult to see how this can be maintained, if it be in any way material to the determination of the case. The bonds which were issued under these acts seem very clearly to depend on the respective acts under which they were issued, for any lien they may have had, on the canal, its lands and revenues, and not on the act of 1832; and the act of 1835 gave no lien at all on the canal or anything appertaining to it, but in place thereof pledged the faith of the State for the payment of the debt and interest. The purchasers of these bonds understood it so, no doubt, for it appears from the record, that while all of the bonds issued under acts subsequent to 1832 were delivered up, and stock certificates received for them, none of the \$200,000 of that issue was so surrendered. But one reason can be imagined for this, namely, that the security for those first issued was sufficient, and the holders of them did not believe they could improve their condition by an exchange for stock certificates, while the holders of the latter bonds believed that with the \$200,000 lien prior to theirs, they *would* improve their condition by taking the State for one-half the debt and the canal stock certificates for the other half. We think their conclusions were sound, and that these several loans were liens of which the \*first was paramount and [ \* 452 ] the others entitled to preference in the order of their date.

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If then these bonds were a lien on the canal, its lands and revenues, paramount to all others, the legislature of Indiana, (whatever it may have designed to do,) could not divest that lien or postpone it to others, because it was the result of contract, and was protected by the provision of the constitution of the United States against impairing the obligation of contracts. This is not controverted, but it is said that plaintiff, by his own act, has done that which the legislature could not do; in delivering up his thirteen bonds, which were either no lien or at most a secondary one, and receiving the canal-stock certificates for half of them and State-stock certificates for the other half, and by payment of the ten per cent. on them required by the law. This idea is strongly urged by counsel for appellant. It is the only ground going to the merits on which plaintiff's right to a decree is resisted, and we have given it our full consideration. It presents itself in two aspects, each of which is entitled to a separate examination. It is said first, that by the acts above mentioned, the plaintiff established a relation between himself and other parties who had made a like surrender of bonds and a like advance of money, which makes it an act of bad faith in him to assert in this suit his right to priority of payment for these bonds, when the result will probably be to deprive those who took the canal certificates of all hope of payment, either for the certificates, or for the money advanced to complete the canal.

If the parties had stood in all respects in the same attitude towards the fund, which was their common security at the time of these transactions, and the plaintiff were now seeking to appropriate that fund to the payment of his debt exclusively, there would be great force in the argument. But such was not the case.

The plaintiff held a double relation to that fund. He had, in common with certain persons, a debt, which was a first and paramount lien on it, and he had, in common with certain other persons, a debt which was no lien, or if a lien, only \*secondary, and of little value. In common with all those who held the prior lien, he refused to surrender it. In common with those who held the other debts he surrendered his, and united with them in such arrangements as were supposed to be for their mutual benefit. There was no concealment of his interest in the debt which had the prior lien, nor of the existence of that lien. The number and character of the bonds which were liens on the canal were matters of public record, accessible to everybody, and all prudent men must have acted in these matters in reference to their existence. It could make no difference to the parties who took the certificates of stock for these bonds, in whose hands the prior lien



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was found. Its amount and its validity were the same, whether in the hands of one who had surrendered other bonds, or of those who had surrendered nothing. We do not attach any importance to the idea that other persons may have been influenced by his example to surrender their bonds, so long as there is no evidence that he used undue persuasion, or made improper representations.

If we were at liberty to inquire into the motives which induced parties to surrender their bonds, and pay their ten per cent., they would probably be found quite consistent with a recognition of plaintiff's right under his prior bonds. The security which they had was manifestly of little value. The canal was incomplete. It paid no interest, and as matters then stood would probably never pay any of the interest or principal. By surrendering these bonds they received State stock for half the amount, for which the State pledged her integrity to provide by taxation, payment of both interest and principal. By advancing \$800,000 it was believed that the canal would be completed, and rendered productive property, and if so, it was expected to pay off all the bonds of the issue of 1832, and then remain ample security for the \$800,000 advanced, and for principal and interest of the canal stock certificates. These calculations seemed likely to be justified by the result, until the wonderful multiplication of railroads ruined the canal by competition. It was a common effort on the part of those who had the inferior class of bonds to make a security which was not \*satisfactory, yield as much as possible; and the fact that [ \* 454 ] one of those had a paramount security on the same fund known to the parties, cannot certainly be called an act of bad faith in him, since he risked his last investment as they did; nor can we perceive that the failure of the scheme, by events not foreseen by any one, should deprive him now of the rights which he then reserved.

But, in the second place, it is maintained that the effect of the acts of 1846 and 1847, when so far complied with as was necessary to put them in force, was to destroy all liens on the canal which were not protected by them, and that no protection was afforded in any case, unless the bonds were surrendered and the new security taken. And while it is conceded that if plaintiff had remained entirely aloof, the act could not have had that effect as to him, it is insisted that his surrender of thirteen bonds, and acceptance of the stock certificate for them, must be held to imply his assent to all the provisions of these acts, including those which destroy his priority of lien for his two bonds of 1832.

If any such implication arises from the transaction, it must be

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one of law, and not of fact; for it would be absurd to suppose that while he consented to the destruction of his security for those two bonds, he failed to surrender them, and get the faith of the State for one-half, and a lien on the canal for the other. Such a presumption must be one of those necessary legal presumptions which the law will not allow to be disproved by any evidence whatever.

So far as he surrendered bonds and received certificate of stock for them, it is beyond doubt that he accepted all the provisions which related to those bonds; but any presumption that he consented to waive other rights, must be based on the ground that the acceptance of those certificates was incompatible with the assertion of his rights in reference to the bonds which he did not surrender. Those statutes did not require that all persons who held bonds should surrender them, nor that all who did so should surrender all they had. They provided that those who *chose* to do so [ \* 455 ] might deliver up their bonds and accept \* the certificates of stock, but nothing was obligatory on the State or the creditors until \$4,000,000 of bonds were surrendered. When that event occurred, the arrangement was binding. But to what extent? We can see no reason for saying it was binding beyond the extent of the bond so exchanged, as between the State and the parties to the transaction. In regard to the State, as to his associates in the matter of the subscriptions, the plaintiff held a two-fold relation; and the fact that he agreed to accept for his thirteen bonds a certain compromise, can scarcely be said to afford an implication, incapable of refutation, that he abandoned his claim under the two other bonds. Nor do we perceive that his surrender of thirteen bonds, and payment of \$1,300 toward the completion of the canal, was inconsistent with his retaining and insisting on his lien for the other two bonds of a different class.

It is unnecessary, however, to pursue this branch of the inquiry further, because we are satisfied that neither the act of 1846, nor the supplementary act of 1847, were in anywise intended to destroy the priority of lien which belonged to the Wabash and Erie Canal bonds, so called. This phrase is applied in the act of 1847, to the bonds issued under the acts of 1832, 1834, 1835, and the \$500,000 issued under the 10th section of the act of 1836. In all of those acts, except that of 1835, the canal was pledged as security for the bonds, and the State guarantied the sufficiency of the security. In section eight of the act of 1846, in which the power is given to the governor to convey the canal to the trustees, and which also goes on to provide in five distinct sub-sections for the order of payment out of the canal fund, there is this very clear and explicit declara-

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tion: After describing the manner of conveyance, and what is to be conveyed, including the canal and all its resources, these words are added: "Subject, nevertheless, to all existing rights and equities against the State on account of the same, or any part thereof, or liabilities of the State growing out of or in relation thereto."

In the supplemental act of 1847, section 10, the order of distribution of the funds arising from the canal resources is somewhat \*changed, but after the ninth and last para- [\* 456] graph on that subject there is this language:

"And it is hereby declared, that such sums shall from time to time be paid and applied as soon as conveniently may be after the receipt thereof, *saving the just rights of the holders of bonds now outstanding, known as the Wabash and Erie Canal bonds, as provided in the eighth section of this act.*"

We cannot resist the conviction that these provisions were intended to preserve the lien which the bondholders of this class had, notwithstanding the transfer of the canal to other hands, for other purposes. The bonds for which the State had guarantied that the canal was a sufficient security, certainly constituted an "existing right and equity against the State," on account of the canal, and a "liability of the State growing out of it." And nowhere more appropriately than in an act transferring the canal to other hands, for other purposes, could the State recognize distinctly the lien which it had created, and the sufficiency of which it had guarantied. What were the just rights of holders of bonds outstanding and known as the Wabash and Erie Canal bonds in January, 1847? Certainly, speaking in reference to the canal fund, of which that act was making a disposition, their right was to have it appropriated to the payment of the accruing interest on these bonds, and the bonds themselves when due, according to their priority of lien. A very ingenious argument is made by the learned counsel for the appellant, to show that these provisions were not intended to apply to this lien, and we are referred to the case of *The State v. Board of Trustees*, (4 Ind. R. 495,) to support that view. But that case, as we understand it, decides nothing more, than that the holder of one of these bonds who had surrendered it for a canal stock certificate, had a right to have his interest paid out of the funds arising from that part of the canal east of Tippecanoe river, before it was appropriated to the completion of the canal to Evansville, under the provision of the act of 1846.

Our construction of these acts is supported by the facts that the State could not destroy the lien if it had designed to do so, that it was reasonable and just that she should protect a lien

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[ \*457 ] \* the sufficiency of which she had guarantied, and that the plain and natural import of the language used justifies this interpretation of the legislative intent.

We are, therefore, of opinion that the bonds on which plaintiff brought his suit, were a paramount lien on the canal, its lands and revenues, from the mouth of Tippecanoe river to the east line of the State, and that said lien has not been impaired by any act of his or of the State, and that the decree in his favor was right on the merits.

It is made a point in the case, that the bill should be dismissed for want of proper parties.

The plaintiff brings his suit in behalf of himself, *and all others interested in the same issue of bonds*. As we have already said, there seems to be no other bonds, which are liens, outstanding, but those of the issue of 1832, all the holders of which are made plaintiffs.

The various creditors of the fund, who have become so since the transfer of the canal property to the trustees, and the holders of the canal stock certificates, whose interest remains unpaid, are fairly and fully represented by those trustees. They come within that class of persons who have an interest in the object of the litigation, but need not be made parties because they are so represented. See Story Eq. Pl. sections 141, 142, 143; Mitford's Eq. Pl. 174; Calvert on Parties to Suits in Equity, top page 17, side page 25; Van Vechten v. Terry, (3 John. Chy. R. 197.)

But plaintiff has brought his suit in behalf of himself and other bondholders of the same class. The record affords strong reason to believe that the other one hundred and ninety-eight bonds of the same issue are outstanding, with arrears of interest unpaid to the same extent as plaintiffs, yet the decree makes no provision for them. This we think is error.

The bill in this case must be treated as in the nature of a creditor's bill, although not strictly of that class. The decree should declare the equality of lien of all these bondholders with plaintiff, and should provide for them the same relief which it gives to him. And the case should be referred to a master to [ \*458 ] \*ascertain who these bondholders are, about which we presume there will be little difficulty, and to notify them to come in and share in the fruits of the decree, on paying their proportion of its expense.

For this purpose the case is remanded to the circuit court, with instructions to proceed in accordance with this opinion.

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Chilton v. Lyons.

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## SAMUEL CHILTON, Trustee, and others, Appellants, v. MARGARET LYONS, Administratrix.

2 Black, 458.

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## VENDOR'S LIEN—MARRIED WOMEN.

1. The unpaid purchase money for real estate is treated in equity as a lien upon the land sold, because when a person has got the estate of another he ought not in conscience to be allowed to keep it without he gives the consideration.
2. A jury having in this case found that the receipt set up was not the receipt of the vendor, and that the purchase money was not paid, and there being no intervening equities, the court below rightfully sustained the vendor's lien.
3. It is wholly immaterial in this case that the purchaser was a *feme sole*, and whether she had or had not a separate estate with regard to which she might contract the debt. The obligation to pay the lien attached at the time, and as the incident to any valid sale of the land.

APPEAL from the circuit court for the District of Columbia. The case is stated in the opinion.

*Mr. Carlisle*, for appellants.

*Mr. Bradley* and *Mr. Stone*, for appellees.

\* Mr. Justice GRIER delivered the opinion of the court. [ \* 460 ] When one person has got the estate of another, he ought not, in conscience, to be allowed to keep it without paying the consideration. It is on this principle that courts of equity proceed as between vendor and vendee. The purchase money is treated as a lien on the land sold, where the vendor has taken no separate security. In the present case this lien has not been defeated by alienation to a *bona fide* purchaser, or any subsequent lien of creditors. The issue taken in the answer concerning the respondents' ability to pay out of her separate estate is wholly immaterial except to give probability to the allegation that she had paid the consideration. The only defense taken in the answer to the claim of the bill is an alleged receipt in full or discharge for the purchase money.

The deed does not acknowledge the payment of the consideration, and the answer admits that no consideration was paid at the time of its delivery. The issue between the parties turned wholly on the genuineness of a receipt or discharge purporting to have been executed and delivered by Elizabeth Braiden on the 12th of September, 1856. The court ordered an issue to try this question at law, and the jury found "That Elizabeth Braiden did not execute and deliver said receipt or discharge, and that it was not the genuine

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receipt of said Elizabeth Braiden." The court, in the exercise of their discretion, refused to grant a new trial of this issue. As it appears to us that the evidence justified the verdict, we see no error in the decree of the court. It did not condemn the defendant to pay the consideration out of her separate estate, but orders the houses to be sold to pay the purchase money, unless before a certain time the defendant shall pay the amount due.

[ \* 461 ] \*Neither the answer of the party, nor the argument of counsel, allege any good reason, why a married woman should be permitted to take property without paying for it, more than another. The disabilities thrown round her by the law are for her protection—not to enable her to commit fraud.

Decree affirmed with costs.

CURTIS'S ADMINISTRATRIX, Plaintiff in Error, v. FIEDLER.

2 Black, 461.

CUSTOMS DUTIES.—NECESSITY OF PROTEST, &c.

1. After the act of 1839, (5 U. S. Stats. 348,) no action could be maintained against a collector of customs for the exaction of excessive duties, after the money had been paid into the treasury, until the act of 26th of February, 1845.
2. Under this act the right of action was made to depend upon a protest which gave the officer notice, which protest must be made at or before the payment of duties.
3. Such a protest was designed to inform the officers that the claim would be asserted against them for the excessive duty, and of the reasons for which it was supposed to be an improper levy, and if it did not do this it was insufficient.
4. Therefore, where a protest was made against duties on hemp and iron, both in one entry, because "there exists no law authorizing the exaction of said duty," when in fact it was only the *amount* of duty on the hemp which was in controversy, the protest is insufficient, and the action cannot be sustained.

WRIT of error to the circuit court for the southern district of New York. The case is well stated in the opinion.

*Mr. Butler*, and *Mr. Coffey*, for plaintiffs in error.

*Mr. Cushing*, and *Mr. Gillet*, for defendant.

[ \* 474 ] \*Mr. Justice CLIFFORD delivered the opinion of the court.

This is a writ of error to the circuit court of the United States for the southern district of New York. According to the transcript, the suit was commenced by the present defendant against Edward Curtis, in the superior court of the city of New York, to recover back an alleged excess of duties paid by the plaintiff upon certain goods and merchandise imported into the port of New York during

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the period that the defendant in the court below was the collector of the customs of that port. Date of the writ does not appear, nor is it of any importance in this investigation, as the record of the suit was on the 1st day of February, 1847, duly transferred under the 3d section of the act of the 2d of March, 1833, into the circuit court of the United States, where all the proceedings in the suit took place, which are now the subject of revision. 4 Stat. at Large, p. 633. Suit was upon promises, and the declaration contained the common counts as in *indebitatus assumpsit*. Subsequently to the transfer of the record, the defendant, then in full life, appeared and pleaded that he never promised in manner and form as the plaintiff had alleged against him, and upon that issue the parties at the April term, 1849, went to trial. To maintain the issue on his part, the plaintiff produced and gave in evidence an original entry made by him at the custom-house in the port of New York on the 1st day of September, 1842, of certain goods and merchandise imported into that port from St. Petersburg, in Russia, in the Russian ship \*Nicholay Savin, and which goods and mer- [ \* 475 ] chandise were duly consigned to the plaintiff by the shipper and owner. Three packages were specified in the entry, of which two consisted of hemp in bundles, and the other of iron in bars, hammered. As described in the entry, one of the packages of hemp contained fifty bundles and the other fifteen, and the package of iron contained eighteen hundred and thirty-five bars.

Unmanufactured hemp, by the act of the 30th of August, 1842, was subject to a duty of \$40 per ton, but manilla, sunn, and other hems of India were subject to a duty of only \$25 per ton. These provisions of the tariff act under consideration are plain and clear, and by reference to the 4th section of the act it will be seen that iron in bars or bolts, not manufactured in whole or in part, was subject to a duty of \$17 per ton. 5 Stat. at Large, pp. 550, 551.

Parties admitted at the trial that the defendant was the collector of the port of New York at the time the entry was made, and that he, as such collector, pursuant to the instructions of the department, charged on the hemp included in the entry a duty of \$40 per ton, under the before-mentioned act of congress. They also admitted that the duties on the hemp as charged by the collector amounted to \$2,575.38, and that the duties charged at the same time on the iron included in the entry amounted to \$848.56, making an aggregate charge for duties on the whole importation of \$3,423.94. Demand of that amount as the proper charge for the duties on the importation was made by the defendant on the day of the entry, and the plaintiff on the same day protested against the

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payment of the same in writing, as appears on the margin of the entry in the words following, to wit: "I hereby protest against the payment of the duty charged in this entry on account that there exists no law authorizing the exaction of said duty." But the whole sum, notwithstanding the protest, was exacted by the defendant, and the plaintiff accordingly, on the 6th day of the same month, paid the amount charged, and on the same day the defendant paid the same into the treasury of the United States. Plaintiff insisted

at the trial that by virtue of the 6th and 7th articles of [ \* 476 ] \*the treaty between the United States and Russia the hemp included in the entry could only be charged with the same duty as that imposed in the tariff act on the hems of India, because the articles of the treaty referred to stipulate in effect that no higher duty shall be imposed on the produce of Russia imported here than is imposed on the like articles of produce imported from the most favored nations. 8 Stat. at Large, 446.

Evidence was accordingly introduced by the plaintiff tending to show that both the Russian hemp and the hems of India are known in trade and commerce as hemp, and that both are used in the manufacture of cordage, and serve substantially the same purposes. On the other hand, the defendant proved, or it was admitted, that all the hems of India are the products not of the *cannabis sativa*, the ordinary hemp plants of Russia and the United States, but of other and different plants and trees, and upon the exhibition of the foregoing proofs both parties rested.

Defendant controverted the position assumed by the plaintiff that the rate of duty could not exceed that imposed by law on the hems of India, and also insisted that the action could not be maintained against him because the protest of the plaintiff did not set forth any distinct and specific ground of objection to the payment of the duties charged on the hemp, and certainly did not set forth distinctly and specifically any such ground of objection to the payment of the same as that assumed by the plaintiff, or in any manner discriminate between the duties charged on the hemp and the duties charged on the iron included in the same entry, but placed the objection to the payment of the moneys solely on the general ground that there was no law authorizing the exaction.

Prayers for instructions were presented by the defendant, affirming that the hemp was legally chargeable with a duty of \$40 per ton, and also embodying the substance of the foregoing objections to the right of the plaintiff to maintain the action; but the presiding justice, concurring with the plaintiff upon the merits, refused the requests, and, among other things, instructed the jury that the



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action might be maintained, although it was an action of assumpsit for the recovery of moneys received by \*the de- [ \* 477 ] fendant for duties paid under protest while the act of the 3d of March, 1839, was in force, and before the act of the 26th of February, 1845, was passed, and that the protest in writing of the plaintiff was sufficiently precise and distinct to enable the plaintiff to recover back any portion of the moneys paid for duties on the hemp included in the entry which should appear to have been illegally exacted. Under the instructions of the court the jury returned their verdict in favor of the plaintiff, and the defendant excepted to the refusal of the court to instruct the jury as requested and to the instructions given. Judgment was deferred in consequence of a motion for new trial and other proceedings, which need not be noticed until the 17th day of December, 1860, and in the meantime the defendant died, and the administratrix of his estate was admitted to defend.

Three questions arise on this state of the case for the consideration of the court. First, whether, under the second section of the act of the 3d of March, 1839, an action of assumpsit on an implied promise can be maintained against a collector of the customs to recover back duties exacted by him in his official capacity after he had received the moneys and paid the same into the treasury of the United States, and if not, then secondly, whether the objection taken at the trial to the payment of the duties was set forth in the protest with sufficient precision and distinctness to bring the case within the provisions of the act of the 26th of February, 1845, authorizing such a suit in cases where the protest is made in writing and sets forth distinctly and specifically the grounds of objection to the payment. 5 Stat. at Large, 727. Thirdly, whether the legal rate of duty upon the hemp included in the entry was the sum exacted by the collector or only \$25 per ton, as assumed by the plaintiff.

I. Recurring to the second section of the act of the 3d of March, 1839, it will be seen that it provides in effect that the money paid to any collector of the customs after the passage of that act for unascertained duties, or for duties paid under protest against the rate or amount of duties charged, shall be placed to the credit of the treasury of the United States, to be kept and disposed of as all other money paid for duties; and it expressly \*pro- [ \* 478 ] vides that such money "shall not be held by the collector to await any ascertainment of duties or the result of any litigation in relation to the rate or amount of duty legally chargeable and collectable in any case where money is so paid." 5 Stat. at Large, 348.

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whole amount of the duties charged upon the entire importation. No pretense is now made that the duty charged upon the iron was illegal or excessive, and the plaintiff concedes that the hemp was subject to a duty of \$25 per ton. Irrespective of authorities, therefore, it is impossible to hold that the protest in this case is sufficiently distinct and specific to admit the objection to the payment set up at the trial. Numerous decisions have been made upon the subject, but there is not one of them that affords the slightest support to the position that the protest in this case constitutes a compliance with the requirement of the act of congress. On the contrary, every one of them affirms the rule that the importer must at least indicate in his protest distinctly and definitely the source or ground of his complaint, and his design to make it the foundation of a claim against the government. *Greeley's Adm. v. Burgess et al.*, (18 How. 417;) *Swanton v. Morton*, (1 Cur. C. C. [ \* 481 ] 294;) *Warren v. \*Peasler*, (2 Cur. C. C. 235;) *Thompson v. Maxwell*, (2 Blatch. C. C. 391.)

Persons importing merchandise are required to make their protests distinct and specific, to apprise the collectors of the customs of the nature of the objections made to the payment of the duties before it is too late to remove them or to modify the charge, and in order that the officers of the government may know what they have to meet in case they decide to exact the duties, notwithstanding the objection, and expose the government to the risk of litigation. For these reasons we are of the opinion that the second question presented for the consideration of the court must also be answered in the negative, and consequently the plaintiff cannot recover in this case. Having come to that conclusion it is unnecessary to consider the question arising upon the merits. The judgment of the circuit court therefore is reversed with costs, and the cause remanded, with instructions to issue a new venire.

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TAYLOR, Plaintiff in Error, v. MORTON.

2 Black, 481.

PRACTICE IN SUPREME COURT.

When a case is brought here on writ of error to a circuit court of the United States, under the 22d section of the judiciary act, this court will not dismiss it for want of a suggestion of errors; but if it appears that there was no bill of exception or other ruling of the court found in the record of which error can be predicated, the judgment will be affirmed.

WRIT of error to the circuit court for the district of Massachusetts.

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*Mr. Cushing* and *Mr. Gillet*, for plaintiff.

*Mr. Butler* and *Mr. Coffey*, for defendant.

\* Mr. Justice CLIFFORD delivered the opinion of the court. [ \* 482 ] This was an action of assumpsit, and the case comes before the court upon a writ of error to the circuit court of the United States for the district of Massachusetts.

Suit was brought by the present plaintiffs against the defendant as the collector of the customs for the port of Boston and Charlestown, to recover back an alleged excess of duties exacted of the plaintiffs by the defendant on certain unmanufactured hemp imported by them from Russia in 1846. According to the transcript, the action was entered at the May term, 1847, and was thence continued from term to term to the May term, 1854, when the parties went to trial upon the general issue. Duties charged on the hemp were \$40 per ton, whereas \* it was insisted by [ \* 483 ] the plaintiffs that the charge should have been but \$25 per ton, because by the 6th and 7th articles of the treaty between the United States and Russia, it is stipulated to the effect that no higher rate of duty shall be imposed on importations from Russia than on like articles from the most favored nations, and by the tariff act of the 30th of August, 1842, the duty imposed on manilla, suun, and other hems of India, was but \$25 per ton. Evidence was introduced on both sides, but the record states that when the evidence was all in, it was agreed that the case should be taken from the jury and submitted to the court, with authority to draw all such inferences of fact as a jury would be authorized to draw from the evidence, and that a verdict should be entered and judgment should be rendered for the plaintiffs or defendant, as the court should think proper upon the law and the evidence.

Accordingly a report of the same was made and signed by the counsel of the respective parties. Whether the parties were ever heard upon this report does not very satisfactorily appear, nor does it appear that any decision was ever made by the court. On the contrary, the record subsequently states that the *ad damnum* of the writ, on motion of the plaintiff, was increased, by leave of court, from \$2,000 to \$2,500; and it also states, among other things, that the case was submitted under instructions from the court to a jury duly sworn to try the same, who thereupon returned their verdict that the defendant did not promise in manner and form as the plaintiffs have declared against him. Judgment was accordingly entered for the defendant, and the plaintiffs sued out this writ of error and removed the cause into this court. They did not, however,

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except to the instructions of the court, and there is no bill of exceptions in the record, nor is there any assignment of errors of any kind. All that appears is the before-mentioned statement that the case was submitted to the jury under instructions from the court, but the instructions are not given, and there is no error apparent on the face of the record.

1. When a suit is brought into this court by a writ of error from a State court under the 25th section of the judiciary act it [ \* 484 ] \* must appear on the face of the record, in order to maintain the jurisdiction, that some one of the questions stated in that section did arise in the State court, and that the question so appearing was decided in the State court, as required in the same section; and if it does not so appear on the record then this court has no jurisdiction to affirm or reverse, and the writ of error must be dismissed.

2. But the writ of error in this case was sued out under the 22d section of the judiciary act, which provides in effect that final judgments in a circuit court, brought there by original process, may be re-examined and reversed or affirmed in this court upon a writ of error. Consequently, when a cause is brought into this court upon a writ of error, sued out under that section, and all the proceedings are regular and correct, it follows from the express words of the section that the judgment of the court below must be affirmed, although there is no question presented in the record for revision. *Minor et al. v. Tellotson*, (1 Howard, 287;) *Stevens v. Gladding*, (19 Howard, 64;) *Suydam v. Williamson et al.*, (20 Howard, p. 440.)

The judgment of the circuit court, therefore, is affirmed with costs.

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THE MISSISSIPPI AND MISSOURI RAILROAD COMPANY, Appellants, v.  
WARD.

2 Black, 485.

NUISANCE—BRIDGE ACROSS THE MISSISSIPPI RIVER—JURISDICTION OF THE CIRCUIT COURTS.

1. The remedy for the abatement of a public nuisance by bill in equity by a private person has succeeded the remedy by information, and is in many respects to be governed by that remedy and the remedy by indictment.
2. But no private individual can sustain the bill who does not show that he suffers a private and special injury beyond that of the public; and therefore he need not make parties those who suffer a like injury.

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3. Nor is it necessary, when the action is against the person who maintains the nuisance, to make parties of all who may be interested in the structure, (as a bridge.)
4. The circuit and district courts of the United States are, in local matters of this kind, limited to the lines of their territorial jurisdiction, as they would be in case of indictment; and the jurisdiction of the federal courts of Iowa and Illinois are bounded and separated by the middle of the main channel of the Mississippi river.
5. In this suit to abate a railroad bridge across the Mississippi river, brought in the district court for the district of Iowa, it does not clearly appear that the portion of the bridge west of the middle of the main channel is a nuisance by reason of its obstruction to navigation.
6. The main pier of the bridge in the middle channel, which is charged to constitute the bridge a nuisance, by reason of its standing diagonally across the arms of the current, is on the Illinois side, and not within the jurisdiction of the Iowa district.
7. As the court of chancery in this case, like a jury in an indictment case, can only relieve on clear and satisfactory proof of the nuisance within its jurisdiction, the decree of the court directing the removal of the bridge east of the middle of the main channel cannot be sustained, and each party is ordered to pay his own costs.

THIS was an appeal from the district court for the district of Iowa. The case is sufficiently stated in the opinion, as to the points decided by the court.

*Mr. Reverdy Johnson* and *Mr. Cook*, for appellants.

*Mr. Lincoln*, for appellee.

\* Mr. Justice CATRON delivered the opinion of the court. [ \* 491 ] James Ward charges the Mississippi and Missouri Railroad Company with having created a nuisance by erecting a bridge across the Mississippi river at Rock Island, and prays that the nuisance may be abated.

The respondent resists the relief prayed, on the ground, among others, that the complainant does not stand in a position to maintain this suit.

Ward was part owner of three steamboats—and commander of one of them—navigating the river in successive trips between St. Louis and St. Paul; and which boats, the complainant alleges, were much injured and delayed by the bridge, which he avers is a great obstruction to navigation—amounting to a prominent nuisance. It is insisted that Ward cannot sue alone, and could only come before the court jointly with the other part owners \* of the [ \* 492 ] vessels injured and delayed. He seeks no damages by his bill, but only an abatement of the nuisance, as a preventive remedy against future injury and delay.

A bill in equity to abate a public nuisance, filed by one who has sustained special damages, has succeeded to the former mode in Eng-

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land of an information in chancery, prosecuted on behalf of the crown, to abate or enjoin the nuisance as a preventive remedy. The private party sues rather as a public prosecutor than on his own account; and unless he shows that he has sustained, and is still sustaining, individual damage, he cannot be heard. He seeks redress of a continuing trespass and wrong against himself, and acts in behalf of all others who are or may be injured; nor is there more necessity for joining with his partners in the prosecution than there is for his joining in the suit any other person, as complainant, who has sustained injury. *Gibbons on Dilapidation*, 402. The character of the nuisance and the sufficiency of the damage sustained is to be judged by the courts. *Iverson v. Moore*, (Ld. Ray, 486; 1 Salk. 15;) *Gibbons on Dilapidation*, 403. But the want of a sufficient amount of damage having been sustained to give the federal courts jurisdiction, will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern.

It is next objected that there are not proper defendants brought before the court. The Chicago and Rock Island Railroad Company, who own the bridge on the Illinois side of the river, and the bridge company who built it, and also A. C. Flagg, who holds a mortgage on the bridge as trustee for others who advanced money to aid in its erection, are not made parties to the suit. The Chicago and Rock Island Railroad Company, and the bridge company, are incorporated, and located in the State of Illinois, and Flagg resides in the State of New York. The alleged nuisance is situate in Iowa, and being local, the suit could only be brought in that State; and, therefore, the court had no power to bring these parties in interest before it.

If the Iowa corporation could have been individually indicted for creating the nuisance, no reason exists why it should not [ \* 493 ] be \*individually prosecuted in chancery for its abatement.

But the facts present a much more serious objection to the complainant's right to sue than either of those above stated. The constitution of Illinois calls for the middle of the Mississippi river as the western boundary of that State, and as Iowa was admitted into the Union after Illinois, a line in the middle of the river is the dividing line between the States.

The complainant sued in the federal court because of his citizenship in a different State from the defendant; and the United States district court holden in Iowa exercised the same jurisdiction that a State court of Iowa could have exercised, and no more. It had no power beyond the middle of the river. On that part of the bridge

within Iowa, and its piers, the court below acted, and ordered that the structure should be removed.

In considering the merits and the other question as respects the complainant's right to sue, some additional facts need be stated.

This bridge is one thousand five hundred and seventy feet long, and the number of piers is six. Three of them are on the Iowa side of the river. The draw pier is the fourth; it is three hundred and eighty-six feet long at its bottom, and forty-five feet wide. The draw space on the Iowa side is one hundred and eleven feet, and on the Illinois side one hundred and sixteen feet wide in the clear. The distance from centre to centre of the small piers is two hundred and fifty-seven feet. The long pier stands at an angle with the thread of the current of about twenty-four degrees, and the small piers are nearly on a line with the thread of the current. The Illinois draw passage is directly over the deepest channel of the river, and directly over the usual track of steamboats before the bridge was built. The Mississippi is about one thousand four hundred and ten feet wide at the bridge, and the middle of the river is about eighty feet westwardly of the long pier.

The Illinois draw passage (one hundred and sixteen feet,) the width of the long pier (forty-five feet,) and the eighty feet between it and the eastern line of Iowa cover a space of two hundred and forty feet of water-way, and which embraces the main channel, \* where steamboats have at all times navigated. It [\* 494] was at the long pier, and in the Illinois draw east of that pier, that the complainant's boats sustained the injuries on which he found his right to sue the Iowa corporation, and to proceed against the bridge *in rem* as a public nuisance.

An indictment could only have been prosecuted against the owner for keeping up the nuisance in Illinois in the courts of that State, because the nuisance was a trespass and crime against the laws of Illinois, and the injuries to the complainant's boats giving him the privilege to sue and abate the obstruction was as local as the public right to indict. He asks nothing from the person of the defendant, but seeks to remove a local object, because he has sustained special damage from that object.

The district court had no power over the local object inflicting the injury; nor any jurisdiction to inquire of the facts, whether damage had been sustained, or how much. These facts are beyond the court's jurisdiction and powers of inquiry, and outside of the case.

The district court ordered three spans of the bridge and three of its piers to be removed, extending to middle of the river. And

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what would be the consequence if we were to affirm that decree? It would, as a consequence, render the bridge useless throughout, but it would not materially remedy the nuisance complained of. The navigation would certainly not be improved so far as the complainant is concerned by removing the Iowa end of the bridge. The cross currents alleged to exist would remain; the large eddy at the lower end of the long pier, and the obstruction to the Iowa draw-passage by the eddy, would still remain.

In the next place: Is the bridge *west* of the Illinois boundary an *unreasonable* obstruction, and therefore a nuisance, that a court of chancery can lawfully remove? In considering this question we must be governed by the same rule on which a court of law could proceed in case of an indictment against the bridge company for committing the nuisance; and the rule is that if the abridgment of the right of passage occasioned by the erection was for a [ \* 495 ] public purpose and produced a public benefit, \*and if the erection was in a reasonable situation, and a reasonable space was left for the passage of vessels on the river, then it is not an unreasonable obstruction and indictable. *Rex v. Russell*, (6 Barn. & Cresw. 566;) 13 How. 623; 15 Wendell, 133.

Then, again, the obstruction to navigation must be plainly a nuisance within this rule before it can be removed by decree. If the proceeding was by indictment, and the jury doubted whether the obstruction was a nuisance or not, they would be instructed to acquit the defendant; and so, if this case was referred to a jury to try the fact, and they doubted, they would be bound to acquit. And the same rule applies in a court of chancery where the court ascertains the fact of nuisance. 2 Story's Com. on Eq. 203, 204.

To say the least in this case, it is certainly very doubtful whether the bridge on the Iowa side is a serious obstruction amounting to a nuisance.

The smaller piers on that side are parallel with the current passing through them, and do not occasion much impediment of navigation to boats without chimneys, nor to rafts.

The main channel *where steamboats* uniformly pass before the bridge was built, and must now pass, is eastwardly of the middle of the river, and on the Illinois side. On this state of the facts, it must be admitted that it is hardly possible to deal with the whole obstruction of any bridge across the Mississippi river, it being a boundary between States almost throughout its whole length. And it is difficult to decree in any case of material obstruction, unless the whole nuisance is in the power of the court. The case before us presents the difficulty very prominently. The plaintiff's case main-



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ly rests on the fact that the draw pier is at an angle to the current, and it is assumed that if this pier was re-constructed parallel with the current, and the draw on the Illinois side was widened the obstruction would be removed to a degree making it short of a nuisance. Now this is a question that we cannot examine, nor reach by a decree, as the relief suggested is clearly beyond our power in this suit. Congress could extend the jurisdiction of the federal courts across the Mississippi river by enlarging the judicial districts on \*either side; or it could confer concurrent jurisdiction on [ \* 496 ] adjoining districts, extending to trespasses and torts committed within the shores of the river. But the courts of justice cannot do it unless authorized by an act of congress.

It is also insisted with great earnestness that the public is entitled to the free navigation of the *whole* river from bank to bank, and as the western half of the river is undeniably within the jurisdiction of Iowa, it follows that the bridge is a clear nuisance within that district to the extent of half its length. According to this assumption no lawful bridge could be built across the Mississippi anywhere; nor could the great facilities to commerce, accomplished by the invention of railroads, be made available where great rivers had to be crossed.

It is ordered that the bill be dismissed and that the costs be divided—each party paying its own.

Mr. Justice NELSON, dissenting. I am unable to agree to the opinion of the majority of the court in this case. The main issue presented on the pleadings and proofs involves the question, whether or not the free navigation of the Mississippi river is obstructed by the erection of the bridge in question across its bed.

The bridge spans the entire stream. As I understood the opinion, it neither denies nor admits the obstruction, but places the decision upon the ground, that the jurisdiction of the court is incompetent to reach or deal with the question.

The east line of the boundary of the State of Iowa and which constitutes the boundary of the district of the federal court, and of course of its jurisdiction, is the middle of the Mississippi river: and the same line constitutes the west boundary of the State of Illinois, and of course the limit of the jurisdiction of the federal court in that State. One moiety, therefore, of the bed of this river is embraced within the local jurisdiction of this court for the district of Iowa and the other moiety within the jurisdiction of the court for the district of Illinois. Neither court possess any local jurisdiction over the entire river, and hence the idea that neither court is

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[ \* 497 ] competent or equal to deal with the obstruction; \*and especially that the court in the Iowa district cannot deal with it on the Illinois side; and for the same reason the court in the Illinois district could not, if the suit was in that court, deal with it on the Iowa side.

Now one plain answer to this course of argument seems to me is, that the obstruction complained of is an obstruction of the moiety of the river on the Iowa side, and within the admitted jurisdiction of the court. There can, therefore, be no want of power in the court to deal with this part of the obstruction. Indeed, it is the only federal court that can deal with it.

I have not been able to discover any answer to this view, as it respects the jurisdiction of the court, or its duty to exercise it. It is admitted, that this moiety of the river has been wholly obstructed so far as the free navigation of the same is concerned—a total obstruction by the erection of the bridge.

I am aware, it is said, or intimated, that the main navigable channel of the river is on the Illinois side; and hence the removal of the obstruction on the Iowa side, could not remedy the wrong complained of. But is this an answer? It may be admitted, that the channel on the Illinois side affords the best navigable channel at all seasons of the year for the passage of boats. But the Iowa side or moiety is also navigable, and, perhaps, for two-thirds of the season quite equal to that on the other side, if not in a superior degree, for the navigation of many of the boats and water-craft employed on this river. Even in the season of low water the depth of the water on the Iowa side ranges from six to ten feet at or near the bridge, as shown by the surveys of the government engineers.

But I do not place my dissent to the opinion of the court wholly, nor even mainly, on the ground above stated, but upon much higher and broader ground.

The right to a free and unobstructed navigation of this river on the part of the public, and especially of the citizens of the United States, depends upon the constitution and the laws of the United States—the public law of the country.

The local laws of the States have no control over it. I speak now of the free and unobstructed navigation of the river, [ \* 498 ] and \*according to this general or public law, the right of navigation exists over every part of it. No principle is better settled or more generally admitted. The reason given is well stated by Lord Denman, in *Williams v. Wilcox*, (8 Ad. & Ell. 314,) and perhaps no river or navigable stream affords a better illustration of the soundness of the principle, or of the reasons upon

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which it is founded, than the river in question. The reasons are, "that the nature of the highway which a navigable river affords—liable to be affected by natural and uncontrollable causes, presenting inconveniences in different parts and in different sides, according to changes of wind or direction of the vessel, and attended by the important circumstances, that, upon no one is any duty imposed by the common law to do that which would be analogous to the ordinary repair of a common highway to remove obstructions, namely, clear away sand banks and preserve any accustomed channel—all these considerations," he observes, "make it an almost irresistible conclusion that the paramount right, if it existed at all, must have been a right in every part of the space between the banks."

Now, this principle, if acknowledged and applied in this case, affords not only ground for the exercise of the jurisdiction of the court, but makes it a duty to inquire into the question of obstruction, and deal with it according as the pleadings and proofs may require or justify.

I agree that this principle has been modified by the judgment of this court in the case of the Wheeling Bridge, in its endeavor to harmonize this public right of navigation with the subordinate right of the States to erect bridges over these navigable waters.

The court there determined that in the erection of a bridge under State authority, if there still existed a free and unobstructed navigation of the river, the bridge would not be considered a nuisance, but upheld as lawful.

The bridge in question is entitled to the benefit of this modification of the principle. And I agree that if there is a free and unobstructed navigation of this river on the Illinois side, it would afford an answer to the admitted obstruction on the side in Iowa.

But this is the only answer that can be given, and it \* is [ \* 499 ] apparent that this answer raises the question whether or not such a channel was left open, a question which the court must hear and determine, and without hearing and determining which in favor of the defendants, the decree must pass against them.

It seems to me, therefore, without pursuing the case further, that the material question in the case before the court below was, whether, notwithstanding the erection of the bridge, a free and unobstructed navigation for the passage of boats existed on the Illinois side of the river; and hence, necessarily, whether or not the bridge constituted an obstruction over that channel. If it did not, then the case fell within the qualification of the principle as applied in the Wheeling Bridge case. If it did, then clearly no

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defense was shown to the admitted obstruction of that part of the river on the Iowa side.

I express no opinion upon the question of fact, the obstruction, as that question is not reached according to the decision of a majority of the court.

I am requested to state that Mr. Justice Wayne and Clifford concur in this opinion.

[Mr. Justice MILLER, having been of counsel in the district court, took no part in the decision of the case here.]

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NOONAN, Appellant, v. LEE.

2 Black, 500.

PARTY IN POSSESSION.—FORECLOSURE OF MORTGAGE.

1. Although a plat of a town is defective, and not entitled by law to be recorded, and the parties making it are liable to fine, still a reference in a deed to such a plat descriptive of the land conveyed is good, if the land can thereby be identified.
2. A party in possession under a deed for an *undivided half of the land* has not such adverse possession of the whole as would make void a deed by a grantor out of possession.
3. A party in possession of land claiming title to it is bound to pay the taxes; and if he permit the land to be sold for taxes, and buy it in for himself, he acquires no title thereby.
4. The statutes of Wisconsin permit a vendor out of possession to make a valid conveyance; but where such adverse possession is under a superior title, it is equivalent to an eviction and a breach of the covenant of general warranty; but where the paramount title is in the warrantor, it is no breach of the covenant.
5. By the rule of the chancery court of England, in a suit for foreclosure of mortgage there can be no decree for the payment of any balance of the mortgage debt after the sum realized from the sale of the mortgaged property, and the federal courts pursue that practice.
6. Therefore a decree for execution for such balance on the report by the master is erroneous, and must be reversed.

APPEAL from the district court for the district of Wisconsin. The case is stated in the opinion.

*Mr. Gillet*, for defendant.

*Mr. Brown*, for appellee.

[ \* 501 ] \*Mr. Justice SWAYNE delivered the opinion of the court.

A careful examination of the facts disclosed in the record is necessary to enable us to arrive at a proper solution of the questions presented for our determination.

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Lee sold, on the 1st day of October, 1855, he and his wife, by deed duly executed, conveyed to Noonan certain real estate therein described, as follows:

“One equal undivided half part or share of that certain tract of land bounded and described as follows, viz.: Beginning in the centre of the Milwaukie river, on the centre of the road represented on the recorded plat of the village of Mechanicsville as running east and west between blocks five (5) and six (6) in said village of Mechanicsville; running thence easterly in the centre of said street to the centre of a street running north and south between blocks three (3) and (5) in Mechanicsville aforesaid; thence southerly in the centre of the last-mentioned street to the centre of a street running east and west between blocks three (3) and four (4) in said village of Mechanicsville; thence easterly in the centre of said last-mentioned street to a point that would be intersected by a north and south line through the middle of block three (3) in Mechanicsville aforesaid; thence southerly on the line bounding the west ends of lots one (1,) two (2,) three (3,) and four (4) in block (4) in Mechanicsville aforesaid, to south line of said lot four (4) in block four (4) aforesaid; thence easterly on the south line of lot four (4) in block four (4) to the west line of a lot of land containing about one-half ( $\frac{1}{2}$ ) an acre, represented on said plat of Mechanicsville as being nearly in a square form in the southeast corner of the town plat of Mechanicsville aforesaid; thence southerly on the west line of said last-described tract of land to the south line of \*the town [\* 502] plat of Mechanicsville; thence easterly on said last-mentioned line to the east line of fractional lot two (2) in section four (4,) in township seven (7,) north of range twenty-two (22) east; thence south to the south line of said fractional lot two (2); thence westerly on the south line of said fractional lot two (2) to the centre of the Milwaukie river; thence northerly in the centre of the Milwaukie river as it winds and turns to the place of beginning. Also the privilege of damming and flowing the Milwaukie river on said fractional lot two (2,) as high as said river would be raised by maintaining a dam at least nine feet high, where a certain dam was located across said river, near the south line of fractional lot two (2,) in the year 1837, as described in deed from Daniel Bigelow and Amasa Bigelow to Herman V. Prentiss, recorded in volume ‘C’ of deeds, on page 329, as to flow-water.”

The deed contains a covenant of general warranty.

Upon the same day Noonan executed to Lee a mortgage upon the same premises, conditioned to secure the payment of \$4,000, in four equal annual installments, with interest at the rate of 7 per

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cent. per annum, payable annually, according to the condition of a bond of the same date executed by Noonan to Lee; and also to secure the payment, by Noonan, of all taxes upon the mortgaged premises. It was further provided, that upon any default by Noonan in respect of the due payment of principal, interest, or taxes, the entire principal of the mortgage debt should, at the option of Lee, thereupon be deemed to have become due, and should, with the interest thereon, be collectible.

At the time of the execution of the bond, Lee made and signed the following endorsement upon it:

"I agree, if my title fails to the property, for the consideration of which this bond is given, except as against the United States, for the portion of the river beyond the meandered line, that I will not enforce this bond; and if any incumbrance shall be found, that the amount of the same shall be deducted from the moneys to fall due on this bond."

On the 4th of March, 1859, Lee filed his bill setting forth that Noonan had paid nothing either of principal or interest of [ \* 503 ] the \* mortgage debt; that he had notified Noonan that he claimed the entire debt to be due, and praying for a sale of the mortgaged premises, the payment of the mortgage debt, and for general relief.

The decree finds the amount due Lee to be \$5,267.20; directs the sale of the mortgage premises, the payment of the mortgage debt, and the bringing of the surplus moneys, if there were any, into court, and then provides that if the moneys arising from the sale were insufficient to pay the debt, interest and costs, that the marshal in his report of the sale should specify the amount of the deficiency, that Noonan should pay it with interest, "*and that the complainant may have execution therefor.*"

From this decree Noonan appealed to this court.

Several objections are made here to the decree:

I. It is said the deed is void because it refers for a part of the boundaries to the recorded plat of the town of Mechanicsville.

The law of Wisconsin (revision of 1849) requires that a town plat shall give "the names, width, courses, boundary, and extent," of all streets and alleys; that it shall be certified by the surveyor, acknowledged before an officer authorized to take the acknowledgment of deeds, and that it shall then, with the certificate of acknowledgment, be recorded.

The 9th section of the act provides that if any person "shall dispose of, offer for sale or lease" any lot or part of a lot before these requirements are complied with, he "shall forfeit and pay

the sum of \$25 for each and every lot or part of a lot sold or disposed of, leased or offered for sale."

This plat was acknowledged on the 15th of March, 1836, and recorded on the 15th of September, 1855. It does not give the names, courses, boundary, or length of the streets, and it is not certified by the surveyor. The certificate of acknowledgment represents the plat as laid out on the "southeast part of the S. E. quarter of section No. 4 in T. No. 7, in R. No. 22 E., on the east side of the Milwaukee river." It was in fact laid out on fractional lot 2, of the section named. The southeast quarter is upon the other side of the section and does not approach the river. Lot 2 bounds upon the river. A large lot delineated on \*the [\*504] plat bounding upon the river is marked "reserved for hydraulic purposes." An island opposite to it is laid down upon the plat. Fractional lot 2, which is twice referred to in the boundaries as given in the deed, bounds upon the river. Parol evidence, not inconsistent with a written instrument, is admissible to apply such instrument to its subject. The designation of the "southeast quarter" in the certificate of acknowledgment was a clerical mistake. The maxim "*falso demonstratio non nocet*" applies. The proof in the case shows clearly where the plat was in fact located. As regards the statute, the plat was fatally defective and afforded no warrant to the recording officer for putting it on record. Nevertheless, its being there was a fact, and whether there or elsewhere, the reference to it in a deed for the purpose of fixing a boundary is sufficient. "That is certain which can be rendered certain." Where a map or plat is thus referred to, the effect is the same as if it were copied into the deed. "This is a familiar rule of construction, in all those cases wherein no other description is given in the title deeds than the number of the lot on the surveyor's plan of a township or other large tract of land." *Davis v. Rainesford*, (17 Mass. 211;) *McIver's Lessee v. Walker et al.*, (4 Wheat. 445.)

II. It is claimed that the deed is void because it was executed to convey lots designated upon a town plat not made in conformity to law, and which it was therefore penal to sell.

No lots are mentioned. The plat is referred to only for the purpose of boundary. The land with the boundaries is conveyed without reference to any subdivision. The fact that it had been illegally laid out and platted into lots and streets does not in anywise affect the deed.

III. It is objected that the deed from Prentiss to Church and Clark of August 4, 1847, in Lee's chain of title, and the deed from Church and Clark to Lee of July 7, 1848, were void, because they

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were made by grantors out of possession, when the premises were held adversely by other parties, under deeds apparently valid.

At the dates of those deeds the Coltons were in possession under a deed of the 22d of June, 1847, from James H. Rogers.

[ \* 505 ] \*The only part of the description in that deed referring to the premises in controversy is as follows:

“Twenty-two acres of land more or less undivided, in fractional lot number two of section four in township seven, range twenty-two, together with one-half of the water-power belonging to said fractional lot two, and also all the right, title, and interest of the said parties of the first part in and to said lot two.”

A title to twenty-two acres undivided would have given the grantee no right to take exclusive possession of the mortgage premises. So far as the record discloses the facts, it appears that Rogers claimed entirely under sales for taxes. It will presently appear that they gave him no title, real or apparent, which he could convey to another.

#### IV. The tax deeds.

It is not denied that at the time Lee conveyed to Noonan, his chain of title was perfect, unless it was broken by one or more of the facts claimed by Noonan to have produced that effect. In this connection the tax deeds found in the record are relied upon. They consist of Exhibits C, D, E, F, G, H, I, J, and the deed to Orton of the 25th of April, 1852.

(1.) The deed last named does not appear to have been recorded. Possession under it can therefore have no effect upon the rights of Lee. The description in the deed does not cover the premises in controversy. That part of the description relied upon is in these words:

“Part of the S. E. quarter section fourth, T. 7, R. 22, bounded north by Demster, east by Jones and Bare, west by river, and south by Allarding, (nineteen acres.”)

The land in controversy is not in *the southeast quarter* of the section, and there is nothing in the case which shows what river is referred to, or where the lands of Demster and the other parties named are situated.

(2.) Exhibits F, I, and J, are duplicates respectively of Exhibits H, C, and E, and may be laid out of view.

(3.) Exhibits C, D, and G, embrace none of the land in controversy. This leaves only Exhibits E and H to be examined.

(4.) Exhibit “E.”

[ \* 506 ] \*This is a deed to James H. Rogers. It bears date on the 17th of February, 1846. It recites a sale to Rogers



on the 14th day of December, 1840, for the taxes of that year. The description embraces lots one and six in block five of the plat. This block is within the limits of the mortgaged premises. At the time of the sale, and for several years previous, Rogers had been in possession of the mortgaged premises under the deed of the 27th of July, 1837, from Prentiss, to whom he had given back a mortgage of the same date to secure the purchase-money. Prentiss had proceeded to foreclose the mortgage, and the premises were sold under a decree rendered on the 26th of June, 1840. Prentiss became the purchaser, and on the 5th of October, 1840, received the master's deed for the premises.

Rogers being in possession, the statutes of Wisconsin required him to pay the taxes, and gave him an action to recover the money back, if he were entitled to it, from the party to whose benefit the payment enured. (Revised Statutes of 1839, sec. 14, p. 47.)

His relation to the property, and to his vendor and mortgagee also, rendered it his duty to make such payment. Neither he nor any one claiming under him can avail himself of a title thus acquired, as against Prentiss and those claiming under him. *Douglas v. Dangerfield*, (10 O. Rep. 152;) *Creps v. Baird*, (3 O. S. R. 377.)

(5.) Exhibit "H."

This deed was also to James H. Rogers, and bears date on the 23d of December, 1845. It recites that the sale was made to Rogers on the 9th of December, 1839, for the taxes of that year.

It embraces lots 1, 2, 3, 4, 5, and 6, in block 5, as delineated on the plat. During all of the year 1839, Rogers was in possession as the vendee of Prentiss, and the same remarks apply as to Exhibit "E."

Underlying these deeds is another objection.

We have already referred to the non-conformity of the town plat to the requirements of the statute, and the fact that it was penal to sell or lease any lot, as such, which it represented. All the witnesses, including Orton, who claimed to be in possession \*of the whole of fractional lot 2, speak of it as a "pre- [ \* 507 ] tended plat." Orton says:

"I do not know of such a village as Mechanicsville in fact, though I have heard of it. I do not know where the plat of Mechanicsville is located, though I know where they claim it is located. I know the land described in the mortgage in the bill of complaint from its boundaries."

It does not appear in the case that any street was ever improved, that any lot was ever inclosed, or that any house was ever built

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Noonan v. Lee.

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with reference to the boundaries of any street or lot. It comes out incidentally in the evidence touching possession, that there is but one house on the plat, and that it is in a ruinous condition, and unoccupied. Nothing is proved *in pais*, recognizing the existence of the plat.

Under these circumstances it may well be doubted whether the sales of lots for taxes were not illegal and void. *Wheeler v. Russell*, (17 Mass. 258; *Strong v. Darling et al.* (9 O. Rep. 201.)

We have not found it necessary to decide that question, and we express no opinion upon the subject.

As the facts are disclosed in the record, we find no defect in the title of Lee. We find that Noonan's title has not "failed" and no encumbrance upon the property is shown. There has been, therefore, no breach of the agreement endorsed upon the bond; nor has there been any breach of the covenant of general warranty in Lee's deed to Noonan. The deed contains no other covenant. The statute of Wisconsin of 1849 permits a grantor out of possession to make a valid conveyance of lands adversely held by another. In all cases where there is adverse possession, by virtue of a paramount title, of lands thus conveyed, such possession is regarded as eviction, and involves a breach of the covenant of warranty. Where, as in this case, the paramount title is in the warrantor and the adverse possession tortious, it is no eviction either actual or constructive, and no action will lie upon the covenant. *Randolph v. Meek*, (1 *Martin & Yenger*, 58;) *Moore v. Vail*, (17 Ill. 185;) [\* 508] (*Rawle on Covenants of Title*, 224.) \*There is another view of this case which must not be passed over in silence.

It is not claimed by Noonan in his answer that there was any fraud or misrepresentation on the part of Lee, or that any fact exists in regard to the title which was unknown to him when he bought the property. It appears by the testimony of Orton, that there was a controversy between him and Noonan about water power, and that it has been adjusted. Orton says: "He" (Noonan) "has no interest with me in this land of record. I don't know that he has any." "I don't know that I have any interest in the result of this suit. I don't know that I will be benefited in any way by Noonan's success in this suit." This is guarded and peculiar language. It is impossible to read the testimony of Orton and resist the conclusion that Noonan bought the property for a purpose, and that having held the title for several years without paying anything, and accomplished that purpose, he is now seeking, upon the pretense of defects of title, finally to avoid the payment of the purchase money, and throw back the property upon the hands of his

vendor. This ungracious work a court of equity will not permit him to do.

If Noonan had gone into possession, and continued in possession under his deed from Lee, this elaborate examination of the state of the title would not have been necessary. With reference to that class of cases, this court, in *Patton v. Taylor*. (7 How. 159,) after referring to numerous authorities, thus laid down the law:

"These cases will show that a purchaser in the undisturbed possession of the land will not be relieved against the payment of the purchase money, on the mere ground of defect of title, there being no fraud or misrepresentation, and that in such a case he must seek his remedy at law on the covenants in his deed. That if there is no fraud and no covenants to secure the title, he is without remedy, as the vendor selling in good faith is not responsible for the goodness of his title beyond the extent of his covenants in the deed. And that further relief will not be afforded upon the ground of fraud, unless it be made a \*distinct [\*509] allegation in the bill, so that it may be put in issue by the pleadings."

This doctrine is fully sustained by the best considered authorities. *Corning v. Smith*, (2 Seld. 84;) *Plat v. Gilchrist*, (3 Sandf. S. C. Rep. 118;) *Butler v. Hill*, (6 Ohio S. R. 217;) *Beebe v. Swartout*, (3 Gilman, 162.)

The proofs in this case show, that before filing his bill, Lee notified Noonan that he elected to consider the entire amount of the mortgage debt as due. This entitled him to a decree for the full amount, although according to the terms of the bond, one of the installments was not due when the bill was filed. *Noyes v. Clark*, (7 Paige, 180.)

It remains to consider that part of the decree which directs Noonan to pay the balance which may remain unsatisfied after exhausting the proceeds of the mortgaged premises.

The equity jurisdiction of the courts of the United States is derived from the constitution and laws of the United States. Their powers and rules of decision are the same in all the States. Their practice is regulated by themselves, and by rules established by the supreme court. This court is invested by law with authority to make such rules. In all these respects they are unaffected by State legislation. *Neves v. Scott*, (13 How. 270;) *Boyle v. Zachary Turner*, (6 Pet. 658;) *Robinson v. Campbell*, (3 Wheat. 323.)

A majority of my brethren are of the opinion, and I am directed by them so to announce, that in the absence of a rule of this court

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authorizing it to be done, it was not competent for the court below to make such an order.

That part of the decree is reversed. The residue is affirmed. The cause will be remanded to the court below with instructions to proceed accordingly.

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GILMAN, Appellant, v. THE CITY OF SHEBOYGAN.

2 Black, 510.

UNIFORMITY OF TAXATION—INJUNCTION.

1. The legislature of the State of Wisconsin authorized the town of Sheboygan to subscribe to a railroad or railroads, and provided that the taxes necessary to pay the bonds issued for such subscription should be levied exclusively on the real estate of said city. Held, that a prior act, by which no such distinction was made as to taxation, constituted no contract with the bondholder against exempting personal property from taxation for that purpose.
2. Nor are these acts liable to the objection that a tax for that purpose is taking private property for public use without due compensation.
3. This court follows the court of Wisconsin in holding that the act requiring this tax to be levied exclusively on real estate is a violation of Article VIII, Sec. 1, of the constitution of that State, which declares that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe."

APPEAL from the district court for the district court of Wisconsin. The case is fully stated in the opinion.

*Mr. Doolittle*, for appellant.

*Mr. Howe*, for appellee.

[ \* 511 ] \* Mr. Justice SWAYNE delivered the opinion of the court.

This is a suit in equity brought here by appeal from the district court of the United States for the district of Wisconsin. The bill states as follows :

The complainant is the owner of a large amount of real estate in the city of Sheboygan, which is described in the bill.

On the 17th of January, 1854, the legislature passed an act entitled "An act to authorize the city of Sheboygan to aid in the construction of a railroad." This act authorized the commissioners named in it to borrow \$100,000 upon the credit of the city, to be invested in the capital stock of a railroad company, authorized to construct a railroad from the city of Sheboygan westwardly by way of Fond-du-Lac to the Mississippi river, and to issue therefor the bonds of the city according to the provisions of the act.

The act further provided that the city should annually levy a tax

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upon all the taxable property of the city sufficient, in addition to the dividends upon the shares of its stock in the company, to pay the interest upon the bonds.

The act also authorized the city council to submit to the qualified voters of the city the question whether the further sum of \$100,000 should be raised and invested in the same manner as the first \$100,000.

By an act of the legislature of the 28th of March, 1856, entitled "An act to authorize the city of Sheboygan to aid in the construction of the Sheboygan and Mississippi railroad," the city council was authorized to subscribe \$50,000 to the capital stock of the company, and to increase the amount of subscription from time to time until the aggregate should reach the sum of \$100,000. The installments upon the stock subscribed were to be paid by the levy of an annual tax upon all the real estate in the city—not exceeding \$25,000 in any one year—until the whole amount of the subscriptions should be paid.

Under these acts the city has made loans and issued its bonds therefor to the amount of \$200,000.

The legislature passed a subsequent act, which is as follows :

"Section 1. All taxes hereafter levied by the common council of the city of Sheboygan for the (payment) of principal or \*interest of any bonds issued or to be issued by said city [ \* 512 ] to aid in the construction of any railroad, plank road, or for any improvement of the harbor at the mouth of the Sheboygan river, shall be levied by said council on the real estate of said city exclusively.

"Sec. 2. All acts or parts of acts that conflict with the provisions of this act are hereby repealed.

"Sec. 3. This act shall take effect and be in force from and after its passage.

"Approved March 7, 1857."

In the year 1857, the city council under the last-named act, levied a tax upon all the real estate within the limits of the city of six cents upon each dollar of the valuation thereof, "for its harbor loans, railroad and plank-road bonds," "and did not levy said sum or any part thereof upon any other kind of property within said city of Sheboygan for the said harbor loans, railroad and plank-road bonds, but levied the tax for the payment of the interest upon those specific objects entirely and solely out of the real estate within said city limits; and that the real estate above stated and set forth in this complaint was included in and was taxed at the rate aforesaid, and for the purpose aforesaid."

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At the time this tax was levied, there was personal property in the city of Sheboygan to the amount of three or four hundred thousand dollars, liable to taxation, and upon which no tax was levied for either of said purposes for the year 1857. The act of March 7th, 1857, and the tax levied under it, are alleged to be void. Defendant, Geele, is the treasurer of said city, and as such authorized to execute deeds for land sold for taxes when the time for redemption expires. The defendants' property in the city has been sold for said tax and bought in by the city. Geele threatens to execute deeds to the city for the same. The time for redemption is about to expire.

The deeds, it is alleged, will cast a cloud upon complainant's title, embarrass him in disposing of the property, and render it less valuable to him. The prayer of the bill is, that the treasurer be perpetually enjoined from executing, and the city from receiving, [ \* 513 ] such deeds, and for general relief. The complainant \* subsequently filed an amended bill, in which it was claimed that the act of 1857, and the tax levied under it, were void, because the act of 1854 provided that a tax should be levied upon *all* the taxable property of the city for the payment of said bonds, that the bonds were issued and taken upon the faith of that act, and that its provisions constitute a contract with the bondholders, which the act of 1857 seeks to violate.

The defendants demurred, and the court sustained the demurrer.

Was there such a contract as is averred in the amended bill?

The act of 1854 authorized the borrowing of money, the issuing of bonds, and the levying of a tax upon all the property in the city, for the purposes specified. The imposition, modification, and removal of taxes, and the exemption of property from such burdens, is an ordinary exercise of the power of State sovereignty. There is no pledge, express or implied, that this power should not thereafter be exercised.

Admitting that the State *could* enter into such an engagement, there is no evidence that it *did*. This fact should never be assumed unless the language used be too clear to admit of doubt. If the agreement existed, the complainant is not in a position to make the question. There is no allegation that the tax levied is insufficient. We hear of no complaint from the bondholders. They are not before us. It does not belong to the complainant, vicariously, to enforce their contract and protect their rights.

The objection, that these acts take private property for public purposes without compensation, and hence are within the prohibition of the State constitution upon that subject, is also without

foundation. That clause of the constitution refers solely to the exercise, by the State, of the right of eminent domain. *The People v. The Mayor of Brooklyn*, (4 Coms. 419.)

Is the act of 1857 invalid, because it requires the tax in question to be levied exclusively upon the real estate of the city?

The provisions of the State constitution, to which our attention has been called, as bearing upon the subject, are the following:

\* Art. VIII. "Sec. 1.—The rule of taxation shall be [ \* 514 ] uniform, and taxes shall be levied upon such property as the legislature shall prescribe."

Art. XI. "Sec. 3.—It shall be the duty of the legislature, and they are hereby required, to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and taxation, and in contracting debts, by such municipal corporations."

The revised statutes of Wisconsin, title 5, chap. 18, page 200, provide as follows:

"Sec. 1. All property, real and personal, within this State, not expressly exempted therefrom, shall be subject to taxation in the manner provided by law."

"Sec. 4. The following property shall be exempt from taxation:

"All property, real and personal, of the United States and of this State. All public or corporate property of the several counties, cities, villages, towns, and school districts in this State." \* \* \*

"All property exempt by law from execution, not exceeding in value \$200.

"The personal property of all literary, benevolent, charitable, and scientific institutions within this State, and such real estate as shall be actually occupied by them for the purposes for which they have been or shall be organized."

"All houses of public worship, and the lots on which they are situate," &c.

"All public libraries, and the real and personal property belonging to or connected with the same.

"The property of all Indians, who are not citizens, except the lands held by them by purchase.

"The personal property of persons, who, by reason of infirmity, age, and poverty, may, in the opinion of the assessors, be unable to contribute towards the public charges.

\* "All property, real and personal, belonging to any [ \* 515 ] agricultural society in this State." \* \* \*

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No other property is exempted.

In *Weeks v. The City of Milwaukee et al.* (10 Wis. Rep. 242,) Mr. Justice Payne, referring to "the provision of article II. sec. 3, requiring the legislature, in establishing municipal corporations, 'to restrict their powers of taxation so as to prevent abuses, &c.' " says, "Restrictions may be and undoubtedly are necessary to prevent abuses which may not amount to a violation of the rule of uniformity. There may be *uniform abuse* of the taxing power by reckless and improvident management on the part of these local authorities, and I think the provision last mentioned was designed to give further protection—in addition to that furnished by the rule of uniformity."

Such was the unanimous judgment of the court. Concurring in that opinion, we lay this section of the constitution out of view.

In *Knowlton v. The Supervisors of Rock County*, (9 Wis. Rep. 410,) the section requiring uniformity of taxation underwent an able and exhaustive examination. The court affirmed the following propositions:

"The levying of taxes by the authorities of a county, city, or town, for their support is as much an exercise of the taxing power as when levied directly by the State for its support. The State acts by the municipal governments, and their acts in levying taxes are as much the act of the State as if the State acted by its own officers.

"The constitution of the State requires, as a rule in levying taxes, that the valuation must be uniform and in all cases alike or equal, operating alike upon all the taxable property throughout the territorial limits of the State or municipality within which the tax is to be raised. And where the legislature prescribed a different rule, the act is a departure from the constitution and therefore void.

"The constitution has fixed one unbending uniform rule of taxation for the State, and property cannot be classified and taxed as classed by different rules.

[ \* 516 ] \* "The provision of the constitution, that taxes shall be levied upon such property as the legislature shall prescribe, does not sanction a discrimination which provides for taxing a particular kind of property for the support of government by a different rule from that by which other property is taxed; for when the kind of property is prescribed the rule of taxation must be uniform. All kinds of property must be taxed uniformly, or be absolutely exempt."

In this case, under the provisions of the charter of the city of Janesville, lands within the city limits laid out into city lots, and other lands not so laid out, had been taxed at different rates, and



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the property of the plaintiff had been sold for the nonpayment of the taxes. The court held the tax void, and enjoined the treasurer from executing deeds to the tax purchasers.

In the case of *Weeks v. The City of Milwaukee et al.* (10 Wis. Rep. 242,) the preceding case was considered and approved by the court. The proposition that the constitutional provision requiring the "rule of taxation to be uniform" extends to municipal corporations, and that the constitutional provision requiring the legislature to restrict their powers of taxation was only intended to furnish a further protection, were expressly and unanimously reaffirmed. They held further, that where the assessors of the city of Milwaukee, in obedience to an ordinance of that city, omitted to assess property to the value of \$150,000, which ought to have been assessed, and that property was thereby exempted from taxation, the omission was fatal to the entire tax, and that the complainant's taxes being increased by the omission he was entitled to an injunction to restrain the sale of his lands for such illegal taxes.

In *Sanderson v. Cross*, (10 Wis. Rep. 282,) the doctrines of *Knowlton v. The Supervisors of Rock County*, were again unanimously approved.

In their opinion the court adopt the following language, from *The City of Zanesville v. Richards*, (5 Ohio State Rep. 589:) "The general assembly is no longer invested with the discretion to apportion the tax, and to determine upon what property and in what proportion the burden shall be laid. A uniform rate \*per cent. must be levied upon all property subject to tax- [\*517] ation according to its true valuation money, so that all may bear an equal burden."

The Ohio case was decided under provisions in the constitution of that State similar to those in the constitution of Wisconsin, to which we have referred.

In the *Attorney General v. The Winnebago Lake and Fox River Plank Road Company*, (11 Wis. Rep. 42,) the court say: "It cannot be denied that under the power of exemption unjust enactments in respect of the power of taxation might be made. But those who framed the constitution did not see fit to prevent such evils by depriving the legislature of the power. But they did provide that whatever property was made taxable *at all* should be taxed by a uniform rule, which was designed to secure equality in the burdens as between the different kinds of taxable property, but of course not as between property taxable and that not taxable."

The court refer with approbation to the *Exchange Bank of Columbus v. Hines*, (3 O. S. Rep. 1.) In that case the supreme court of

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Ohio, say: "Taxing is required to be by a '*uniform rule*'—that is, by one and the same unvarying standard. Taxing by a uniform rule requires uniformity not only in the *rate* of taxation, but also uniformity in the mode of assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment, as well as the rate of taxation. But this is not all. The uniformity must be co-extensive with the territory to which it applies. If a State tax, it must be uniform all over the State. If a county or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the constitution does not stop here. It must extend to *all property* subject to taxation, so that all property may be taxed alike—equally—which *is* taxing by a uniform rule."

We forbear to examine the soundness of the conclusions of the supreme court of Wisconsin. They need no support at our hands.

We could add nothing to what they have so well and [ \* 518 ] \*ably said in vindication of their own views. Such a discussion would encumber this opinion without throwing any new light upon the subject.

Acting upon a principle, recognized in its administration from the earliest period of its history, this court considers itself bound, in cases like this, to follow the settled adjudications of the highest State court, giving constructions to the constitution and laws of the State. (*Leffingwell v. Warren*, decided at this term.)

The bill avers that at the time the tax complained of was levied, there was personal property in the city, of the value of from \$300,000 to \$400,000, liable to taxation. The demurrer admits this fact. The statute prescribing the property to be taxed, and that to be wholly exempted from taxation, shows that this personal property must have been taxed for other purposes. This tax was levied exclusively upon the real estate of the city. That was a discrimination in favor of the personal property. It was beyond the constitutional power of the legislature to make any discrimination. Property must be wholly exempted or not exempted at all. No partial exemption or discrimination is permitted. To impose certain taxes exclusively upon one class of taxable property is as much a discrimination as to vary the rates of the same or other taxes upon different classes of property.

The latter was attempted to be done, as has been shown, in the city of Janesville. The tax was adjudged to be utterly void.

The same result must follow here.

A case illustrating more strongly than the case before us the

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wisdom of the rule of the constitution, as thus interpreted, and the injustice which may be done in departing from it, can hardly be imagined.

The court below erred in sustaining the demurrer and dismissing the bill.

The decree is reversed, and the cause remanded for further proceedings in conformity with this opinion.

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GRIFFING, Appellant, v. GIBB.

2 Black, 519.

PRACTICE IN EQUITY.

1. Where a bill alleges facts which go to show that a city is about to inflict an irreparable injury to plaintiff's lots, and alleges that they are proceedings without authority of law, a demurrer to the bill for want of equity should not be sustained.
2. If defendants rely on the authority of an act of the legislature, the defense should be made by plea or by answer, and not by demurrer.

APPEAL from the circuit court for the northern district of California. The case is sufficiently stated in the opinion.

*Mr. Hepburn and Mr. Wilkins*, for appellant.

*Mr. Black and Mr. Latham*, for appellee.

\*Mr. Justice WAYNE delivered the opinion of the court. [ \* 521 ] This is an appeal from a decree of the circuit court of the United States for the northern district of California.

The complainant seeks to obtain a perpetual injunction to restrain the defendants from piling and improving a lot of land claimed by them, which is said in the bill to be within the inside of the waterfront line of the city of San Francisco, and always covered by the tidewaters of the bay. He states that he is the owner in fee simple, and is in possession of two parcels of land; the first beginning at a point where the east line of Sanson street intersects the south line of Filbert street, running thence southwardly along the east line of Sanson street 137 feet; thence east, at right angles to Sanson street, 275 feet; thence north, parallel with Sanson street,  $137\frac{1}{2}$  feet, to a point in range with the south line of Filbert street; thence west 275 feet to the point of beginning. The second, "A lot beginning at a point where the east line of Sanson street intersects the northern line of Filbert street; thence north along the east line of San-

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son street 137½ feet; thence at right angles to Sanson street, 275 feet; thence south, parallel with Sanson street, 137½ feet, to a point in range with the north line of Filbert street; thence 275 feet to the place of beginning."

The complainant asserts that he is in the exclusive occupation and possession of both lots of land under a title in fee; that he has buildings and improvements upon them of the value of \$200,000. He further avers that his lots originally fronted on and were a part of the natural shore of the bay of San Francisco; that they had a deep and high bank in the rear, with a bold and deep water in front, where the tide ebbed and flowed, where ships of the largest class navigated in safety to receive and discharge cargo. Passing over other allegations in the bill not necessary to be mentioned in this connection, the complainant asserts that he commenced to make his improvements in the year 1851, and that he had used and enjoyed them for the purposes for which they had been constructed, until interfered with by the defendants, having piles driven in front of his premises, under the navigable waters [ \* 522 ] of the bay, extending over \*a space of 275 feet square.

That the defendants assert, notwithstanding his remonstrances against such piling, that they have a right to drive them, and declare it to be their intention to build a wharf upon a lot which they claim, situate as follows: Beginning at the northeast corner formed by the extended lines of Filbert and Battery streets, being a lot of land covered by the navigable tide of the bay of San Francisco, &c., &c., where ships of the largest class habitually pass and repass in their approaches to the complainant's warehouses. It is then averred that if the piling shall be done at that point that it will interfere with the public use of the harbor and the bay, obstruct the navigation, divert the tide from its usual flow and ebb, change its current, and shallow the water by deposits of sediment, as it has already done, there being shallower water at the point designated than there had been before the defendants wrongfully began to pile there, and particularly so in front of the complainant's premises, than there had been when he began to improve his premises in the year 1851; that the depth of the water there is being constantly lessened by said piling, greatly to the complainant's pecuniary loss, and will be to his irreparable injury unless the defendants shall be restrained from continuing their unlawful acts by an injunction, and by a decree of the court for the abatement of the defendant's piling as a nuisance. That the piling which has been done by the defendants is contiguous to his premises; that it is on a lot covered by the ebb and flow of the tide of the bay of San Fran-

cisco, and that the defendants claim the lot to be within the city of San Francisco.

The defendants filed a general demurrer to the bill. We think that the court erred in sustaining it, and in dismissing the bill of the complainant for want of an amendment, which the court directed to be made by the next rule day. On the demurrer the ruling of the court should have been for the complainant, instead of which the court dismissed his bill. The only point in our view of the case, when it was on its hearing in the court below, was, whether the complainant had not shown, by the facts stated on the face of his bill, artificial as it may be in point of form, a case for relief within the jurisdiction \*of a court of equity. [\* 523] We think it to be so, and shall remand it to the court below for amendment and further procedure, as in the judgment of that court the case may require.

We further observe that the filing of a general demurrer was not in the pleadings and facts of the case a proper defense. The defendants might have resorted to a plea alleging matter, which, if appearing on the face of the bill, would have been a good cause of demurrer, or the bill should have been answered. The demurrer filed was a denial in form and substance of the right of complainant to have his case considered in a court of equity, but an admission that all the allegations of it which were properly pleaded were true. In respect to what was said in the argument that this court would, on the general demurrer of the defendants, judicially notice the acts of California relating to the harbor of San Francisco, and particularly of the water-lot act of the 26th March, 1851, we will only remark that we should do so if the pleading in the case was such as permitted it to be done, and if we did not think, as we have already said, that upon that plea the cause should not have been dismissed, and that the courts should have ruled in favor of the complainant; and it is now here ordered, adjudged, and decreed by this court, that the decree of the said circuit court in this cause be, and the same is hereby reversed, each party paying his own costs on this appeal in this court, and that this cause be and the same is hereby remanded to the said circuit court for further proceedings to be had therein, in conformity to the opinion of this court.

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Bronson v. La Crosse and Milwaukee Railroad Company.

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**BRONSON and SOUTTER, Appellants, v. THE LA CROSSE AND MILWAUKEE RAILROAD COMPANY.**

2 Black, 524.

**PRACTICE IN SUPREME COURT—FRAUD ON THIRD PARTIES.**

James & Co. were purchasers, under a decree of mortgage foreclosure, of the western division of the La Crosse railroad, and the present appeal was from a decree of foreclosure against the eastern division, under different mortgage authorized by statutes of the State: Held,

1. That James & Co. could not intervene in this court to contest a decree by foreclosure for a larger sum than the decree rendered in the circuit court, on the ground that as they had bought all the rolling stock, this decree might prejudice their rights.
2. Nor on the ground that, as general creditors of the defendant corporation, the increased amount of the decree might prejudice their interests as such.
3. Nor is it anything to them that a judgment creditor of the road was not made a party to the suit.
4. A decree in a foreclosure suit which ascertains the amount due, and directs the land to be sold in default of payment, is a final decree, so as to be the foundation of an appeal.

APPEAL from the district court for the district of Wisconsin. The various matters decided are stated in the two opinions, with motions made in the case.

*Mr. Black*, in support of the motion.

*Mr. Carlisle* and *Mr. Ewing*, opposed.

[ \* 525 ] \* *Mr. Justice DAVIS* delivered the opinion of the court.

F. P. James, Isaac Seymour, and N. A. Cowdrey ask leave to intervene in this cause, and to dismiss the appeal, and predicate their motion on two affidavits of F. P. James.

The first affidavit states substantially that on the 31st of December, 1856, the La Crosse and Milwaukee Railroad Company executed a mortgage on the western division of their road, lying between Portage and La Crosse, to Greene C. Bronson, James A. Soutter, and Shepard Knapp, as trustees, to secure certain bonds, which mortgage was afterwards foreclosed in the district court of Wisconsin, and the mortgage property sold, and purchased by the parties

asking to intervene; that the same railroad company, on [ \* 526 ] the 17th day of August, 1857, executed another \* mortgage to these complainants, Bronson and Soutter, on the eastern division of their road, lying between Portage and Milwaukee, to secure certain other bonds; that suit was also brought on said mortgage in the district court of Wisconsin, where a decree was passed on the 13th day of January, 1862, for one-half of the face of

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the bonds, from which decree an appeal was taken by Brounson and Soutter to this court; and that the parties to the suit have entered into fraudulent stipulations to reform the decree rendered below, so that the bonds will be paid in full, and that James Cowdrey and Seymour, as purchasers under the first mortgage, will be injured if the decree is thus reformed.

The second affidavit states that Nathaniel S. Bouton, on the 5th day of April, 1859, recovered a judgment in the same district court for upwards of \$7,000 against the La Crosse and Milwaukee Railroad Company, which judgment was assigned to F. P. James & Co., and was a lien when this suit was instituted, and that neither Bouton nor his assignees were notified of the pendency of these proceedings; that there were issued under the mortgage of December 31st, 1856, bonds to the nominal or par value of \$4,000,000, the greater portion of which are held by James and his associates in their own right or in trust for others, and that they have by the advice of counsel determined to abandon their purchase and ask for a re-sale of the whole property mortgaged by the deed of December 31st, 1856.

Have James, Seymour, and Cowdrey a right to intervene in this cause, to make a motion to dismiss this appeal, or for any other purpose? The La Crosse and Milwaukee Railroad is a corporation created by the laws of Wisconsin to build a continuous line of railroad from the city of Milwaukee, on Lake Michigan, to La Crosse on the Mississippi river. Power was given to the company to mortgage separate portions of their road, and in execution of that power the mortgage of December 31st, 1856, on the western division, and the mortgage of August 17th, 1857, on the eastern division, were given. These mortgages were executed to secure specific liens on different parts of the road, and the bondholders evidently relied on these liens alone \* for their security. Separate [\* 527] suits were brought at different times to foreclose these mortgages, and the parties in one suit were not necessarily parties in the other. The right to intervene as made by the first affidavit rests solely on the ground that James and his associates were purchasers of the western division of the road, which, as they insist, included "the personal property, machinery, rolling stock, franchises, rights, and privileges of the entire road."

This court cannot in this suit decide whether the construction contended for by these parties as to the extent of their purchase is correct or not. Under the pleadings, no question is or could have been raised as to what property is covered by the mortgage deed. The controversy in the court below was whether there should be a

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decree *nisi* for any amount, and if so, how much. The court in fixing the amount due on the mortgage, estimated the bonds not at par, but at the rate of fifty cents on the dollar, and decreed accordingly, and the complainants below appealed. It is not perceived *how* the stipulation to reform the decree can affect the *right* of James & Co. to the claim which they advance. If under their purchase they take the rolling stock and franchises of the whole road, what concern is it to them whether the decree is for \$500,000, or \$1,000,000?

Such a *right* is surely not dependent on the amount of the decree. But it is claimed, in the second affidavit, that Bouton, a judgment creditor, having lien, and necessarily a party, had no notice of the pendency of this suit. The answer to this statement is, that the record informs us (p. 297) that Bouton did appear by attorney, and consented that a decree might be rendered pursuant to the prayer in the bill.

One other ground remains on which the right to intervene is placed—that of general creditors. James and his associates, owning a large portion of the bonds secured by the lien of the first mortgage, insist that the mortgage is an insufficient security, and that they are, therefore, interested in lessening the amount of the decree to be rendered in this cause. Every creditor is, of course, concerned that his debtor should reduce his obligations. The less the debtor owes the greater his ability to pay.

[ \* 528 ] \*But was it ever seriously maintained that a general creditor, having no specific lien, had a right to interfere in the contests between his debtor and third parties? If the general creditors of a mortgagor are suffered to intervene in an appellate tribunal, this court would become the triers of questions of fact outside of the record, and that too on *ex parte* affidavits—by no means the best mode of ascertaining truth.

If the right was conceded to one creditor it would have to be to another, and where the creditors are numerous, as in the case of railroad bondholders, the exercise of the right would lead to great embarrassment.

If, as is charged, the parties to this suit have made agreements in fraud of the law, or rights of third persons, the circuit court of Wisconsin can give relief in a suit instituted there for that purpose, where testimony can be taken, and the valuable right of cross-examination at the same time preserved. In any case—where it is apprehended that the parties to the record seek to dispose of it by stipulations fraudulently made, and which will affect injuriously the rights of others—the court will respectfully hear and consider



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*suggestions*, and will endeavor to protect itself from imposition, and prevent the wrong that is contemplated.

But the court cannot lay down any general rule of practice by which it will be governed, for each case must depend on its own circumstances.

The motion is overruled.

At a subsequent day of the term a motion was made by one of the persons who was a joint defendant with the La Crosse and Milwaukee Railroad Company, to dismiss the appeal on the ground that the decree of the court below was not final.

*Mr. Carpenter*, of Wisconsin, in support of the motion.

*Mr. Ewing* and *Mr. Carlisle*, *contra*.

Mr. Justice DAVIS delivered the opinion of the court.

This case is again before us. A motion \*is now made [ \* 529 ] by one of the defendants to dismiss the appeal, because there was no final decree in the meaning of the act of congress which authorizes this court to exercise appellate jurisdiction only by appeal, or writ of error from a *final* judgment or decree.

This is a suit in equity brought by Bronson and Soutter in the district court of Wisconsin to foreclose a second mortgage, given by the La Crosse and Milwaukee Railroad Company, to secure a large issue of bonds. The company being in arrears for interest, Bronson and Soutter sought the aid of a court of equity to enforce their trust. Numerous persons were made defendants, who had, or were supposed to have liens, and the record, which has swelled to a printed volume of six hundred pages, shows the litigation to have been protracted and bitter. The bill was filed on the 9th day of December, 1859. A part of the defendants answered, which answers were replied to, and a *pro confesso* decree was taken as to those who did not answer; and the cause came on for final hearing on the 13th day of January, 1862. The court judicially ascertained that there was owing to the complainants, on the security of their mortgage, the sum of \$500,000 for principal, and \$65,260.05 for interest, and decreed that the mortgaged premises should be sold at public auction by the marshal, unless the amount found due for arrears of interest, with taxed costs, should be paid before the day of sale. The equity of redemption was foreclosed, and it was ordered, if a sale should be made, that the purchaser should have possession, and that those who had control of the road should surrender the possession on production of the deed from the marshal.

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with a certified copy of the order confirming the sale. It was also decreed, if the interest and costs were paid, that further proceedings should be stayed until some future default should be made in the payment of interest, when, on petition, the court would found another order for sale.

The litigation between Bronson and Soutter and the defendants, on any matter in which there was a joint interest, is closed by this decree. The object of the suit was to ascertain how much money was due on the security of the mortgage and to [ \* 530 ] sell the \* property unless the amount was paid. The court did find what was due, and ordered a sale. The very purport of the litigation, which was initiated by Bronson & Soutter, was accomplished and nothing remained for them to do, if they felt aggrieved by the finding of the court, but to appeal. Their right of appeal attached on the rendition of the decree, and the time limited in which an appeal could be taken began to run from the date of the decree. It is said that some exceptions to the report of the master were pending and undetermined when this decree was made; but those exceptions did not relate to any claim of Bronson and Soutter; they were collateral to the main purpose of the suit, and concerned the defendants alone.

If Bronson and Soutter should have to sit quietly by until the equities of the different lien creditors of the La Crosse and Milwaukee Railroad Company—with which they have no concern—are determined, they might be ruined before they could avail themselves of their right of appeal. Bronson and Soutter insist that there is due them, as trustees, on this mortgage, \$1,000,000, with large arrears of interest, which claim was reduced one-half by the court below.

The La Crosse and Milwaukee Railroad Company is evidently greatly embarrassed, and the property mortgaged is doubtless the only security relied on by the trustees for payment.

Now, if the court had the right to make the decree and order the sale—of which there can be no question—and the right of appeal is in abeyance until the sale is perfected, and the different collateral equities between the railroad company and other parties are settled, great mischief might ensue.

If this court *should* find that Bronson and Soutter are entitled to their whole claim, and in the meantime the property is sold and out of their control, how would their success benefit them? It would be a victory barred of results. If the decree was reversed there could be no restitution of the road, its property and franchises; for purchasers at a judicial sale are protected.

A rule, from which consequences so injurious to the rights of par-

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ties litigant would necessarily result, has never received the sanction of this court.

\*This decree is not final, in the strict technical sense of [\*531] the word, for something yet remains for the court below to do. But, as what was said by Chief Justice Taney, in *Forgay et al. v. Conrad*, (6 How. 203,) "this court has not therefore understood the words 'final decree,' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature."

In the case of *Ray v. Law*, (3 Cranch, 179,) and *Whiting v. The Bank of the United States*, (13 Wheaton, 15,) this court has decided that a decree for the sale of mortgaged premises is a final decree from which an appeal lies. The court rested their decision on the ground that when the mortgage was foreclosed and a sale ordered, the merits of the controversy were finally settled, and the subsequent proceedings were simply a means of executing the decree.

But, in denial of the right of appeal, it is said that a cross bill filed by leave of the court is undetermined. This cause was heard and determined on the pleadings then existing, and no cross bill was pending, although the litigation had been protracted beyond two years. It is true that the court, on the 7th day of January, 1862, and before the decree was passed, gave leave to the "defendants, Sebre, Howard, Graham, and Scott, the Milwaukee and Minnesota Railroad Company, and any other defendants who have liens subsequent to those claimed by Selah Chamberlain, to file a cross bill against said Chamberlain, contesting the liens under the lease or assignment, or judgment claimed by him in his answer—provided said cross bill should be filed by the 1st of February, 1862."

The bill was filed on the 1st of February, after the decree of foreclosure was made and sale of the premises was ordered, and Bronson and Soutter were made parties, although there was no order of the court permitting it to be done, and process was regularly issued and served on them.

It is an independent proceeding, instituted by certain lien creditors of the road, who were defendants in the original suit, seeking to invalidate a prior lien set up by Chamberlain, another \*defendant, in his answer. It can effect in nowise the [\*532] right of Bronson and Soutter to foreclose their mortgage, and has no bearing on the legitimate questions presented for the consideration of the court in the bill filed by them for that purpose. Such must have been the view entertained by the judge of the dis-

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strict court, for we cannot suppose that he intended to embarrass the parties to the original suit, after it was ended, by allowing the defendants to that suit to litigate their own claims to the injury of the original complainants. It is proper to say, that we do not approve of the practice of filing a cross bill after the original suit has been heard and its merits passed on. If any of the defendants in this suit wished to have the equities between themselves settled without instituting an original suit for that purpose, they should have applied to the court at an earlier stage of the litigation, and not waited until the pleadings were perfected, proofs taken, and the cause, after two years of delay, ready for hearing.

The motion is overruled.

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SUMNER and others, Appellants, v. HICKS and others.

2 Black, 532.

STATE DECISIONS AS GUIDES FOR THIS COURT.

1. When the State court of Wisconsin, under statute concerning fraudulent assignments, which is a copy of 13th Elizabeth, chapter 5, held an assignment void, because it authorized the assignee "to sell upon such terms and conditions as in his judgment may appear best for all parties," this court will follow that construction of these statutes by those courts.
2. But a second assignment, made on purpose to correct this error, and which is not obnoxious to that charge, is good, notwithstanding the making of the first.

APPEAL from the district court for the district of Wisconsin. The case is stated in the opinion.

*Mr. Smith*, for appellants.

No counsel for appellees.

[ \* 533 ] \* Mr. Justice SWAYNE delivered the opinion of the court.

This is a suit in equity, having for its object to set aside two assignments made by the defendants, Henry Hicks and Asa Hicks, to their co-defendant, Forbes.

The appellants are the complainants in the bill. They have recovered judgments at law against Henry and Asa Hicks, upon which executions have been returned unsatisfied.

The first assignment was executed on the 4th of January, 1858. The conveyance of the property is followed in the instrument by this provision: "In trust, nevertheless, and to and for the following uses, interests and purposes, that is to say, that the said party of the second part shall take possession of all and singular the lands,

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tenements and hereditaments, property and effects hereby assigned, and *sell and dispose of the same upon such terms and conditions as in his judgment may appear best and most for the interest of the parties concerned*, and convert the same into money."

The second assignment bears date on the 6th of May, 1858. It is declared "to be made and entered into for the express purpose of correcting and explaining the true intent and meaning of a like indenture made and executed between the same parties, on the 4th day of January, A. D. 1858, and which said last-described instrument as corrected shall read as follows:"

Then follows the body of the instrument, which is the same with that of the prior assignment, except that in the clause authorizing the assignee to sell and dispose of the assigned property, the words "upon such terms and conditions as in his judgment may appear best and most for the interest of the parties concerned" are omitted.

The first assignment was executed only by the assignors. The second recites that it is between Henry Hicks and Asa Hicks, of the first part, and Forbes, of the second part; and it is executed by all the parties.

The statute of Wisconsin upon the subject of fraudulent conveyance \* is substantially the same with that of the 13th [ \* 534 ] of Elizabeth, chapter 5.

The supreme court of the State has held that such a provision as that referred to in the first assignment renders the instrument fraudulent and void as against creditors. *Keep v. Sanderson*, 12 Wis. 362.

In cases like this, involving the construction of a State statute, this court is governed by the judgment of the highest judicial authority of the State. (*Leffingwell v. Warren*, decided at this term.) This ruling of the supreme court of Wisconsin is sustained by numerous adjudications in other States. 2 Seld. 510; 6 Seld. 691; 17 New York, 21; 21 New York, 168; 2 Duer, 533; 24 Illinois, 257; 11 Md. 173.

There are conflicting authorities upon the subject of great weight. 6 O. S. 620; 7 Paige, 272; 11 Barb. 198; 4 Sandf. S. C. 252. See also the dissenting opinion of Brown, justice, in *Benedick v. Post et al.* (12 Barb. 168.) The question, as an original one, is not before us, and we express no opinion upon it.

The statute of Elizabeth was declaratory of the common law. In the absence of such legislation the common law would have accomplished the same results. *Twyne's case*, (3 Coke, 80; S. C. 1;) *Smith's L. C.* 1; *Codagan v. Kennet*, (Cowp. 434;) *Wheaton v.*

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Sexton, 1 Amer. L. C. 68; 1 Cranch, 316; 1 Binney, 514, 523; 4 McCord, 295.

It is not claimed that when the second assignment was executed any creditor had acquired a lien upon the property covered by it.

That assignment is free from the vice which was fatal to its predecessor, and is valid. 11 Illinois, 503; 16 Pick, 247; 28 Vermont, 150; 2 Ed. C. R. 289. This proposition is so clear, upon reason and authority, that it would be a waste of time to discuss it.

None of the authorities relied upon by the counsel for the appellant are in conflict with this decision.

In one of them the assignee did not join in the execution of the second instrument, and it did not appear that he had ever [ \* 535 ] \*assented to it. In the others, creditors had interposed, and intervening rights had attached to the property.

"It is a settled principle that a deed voluntary or even fraudulent in its creation, and voidable by a purchaser, may become good by matter *ex post facto*." 4 Kent's Com. 559; 1 John. C. R. 136; 15 John. R. 571; 2 Edwards C. R. 289; 1 Sid. 133; Amer. L. C. 82.

The court below dismissed the bill. We think there is no error in the decree, and it is affirmed with costs.

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WRIGHT, Plaintiff in Error, v. BALES.

2 Black, 535.

This court reasserts the doctrine that where the statutes of a State have made a party to a suit a competent witness in his own behalf, the federal courts are bound by the law when sitting within that State.

WRIT of error to the southern district of Ohio. The case is stated in the opinion.

*Mr. Lee* and *Mr. Fisher*, for plaintiff.

No counsel for defendant.

[ \* 536 ] \*Mr. Justice WAYNE delivered the opinion of the court.

The plaintiff in error seeks for a reversal of the judgment in this case, for errors alleged to have occurred upon the trial of it in the court below, but our attention having been called to the rejection of a witness, we shall confine ourselves to that assignment of error, without considering such of them as relate to the merits of the litigation or to the admission of the

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deposition of A. B. Dickerson, taken *de bene esse*, as evidence in the case.

The error complained of is, that the court erred in refusing to allow one of the plaintiffs, Matthias B. Wright, to testify as a witness in the cause.

The cause was tried in the circuit court of the United States, sitting at Cincinnati, Ohio. In the year 1853, the legislature of that State passed a statute entitled "An act to establish a code of civil procedure," in which it is declared that "no person shall be disqualified as a witness in any civil action or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of a crime, but such entries or conviction may be shown for the purpose of affecting his credibility." This statute was in force at the time of this trial. Wright, one of the plaintiffs, was offered as a witness under it, but was rejected by the court as incompetent to testify, by reason of his interest in the event of the suit, and because of a rule of court, which it was said excluded such a witness from examination unless previous notice had been given to the opposite party of an intention to examine him.

It appears, however, whatever may have been the intended application of that rule, under the "code of civil procedure" or otherwise, that it had become inoperative by the repeal in the year 1858 of that section of the Ohio code which required such a notice to be given. The repealing act of 1858 is a statute to \*amend [ \* 537 ] the 313th and 314th sections of the code of civil procedure.

The rejection of Wright, then, as a witness, for incompetency to testify in his own behalf, raises again, in this court, the question whether the statutory enactments of the States of the Union, in respect to evidence in cases at common law, are not obligatory upon judges in the courts of the United States to apply them as rules of decision in the trials of such cases.

The 34th section of the judiciary act of the 24th September, 1789, (Statutes at Large), is in these words: "that the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as 'rules of decision' in trials at common law in the courts of the United States, in cases where they apply;" meaning by the word trials, as this court has said in *Wayman v. Southard*, (10 Wheat.,) matters of controversy, and not to executions and the mode of executing them. As to the application and the extent of the allowances of the laws of the States in such cases, this court gave its interpretation of the 34th section very fully in *McNe*

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Holbrook, (13 Peters, 84.) We then said: "We do not perceive any sufficient reason for so construing this act of congress as to exclude from its provisions those statutes of the several States which prescribe rules of evidence in civil cases in trials at common law. Indeed, it would be difficult to make the laws of the State in relation to the rights of property the rule of decision in the circuit court, without associating with them the laws of the same State, prescribing the rules of evidence by which the rights of property must be decided. How could the courts of the United States decide whether property had been legally transferred, unless they resorted to the laws of the State to ascertain by what evidence the transfer must be established. In some cases the laws of the States require written evidence, in others it dispenses with it, and permits the party to prove his case by parol testimony; and what rule of evidence could the courts of the United States adopt to decide a question of property but the rule which the legislature of the State has prescribed? The object of the law of congress was to make [ \* 538 ] the \* rules of decision in the courts of the United States the same with those of the States; taking care to preserve the rights of the United States, by the exceptions contained in the same section. Justice to the citizens of the several States required this to be done, and the natural import of the words used in the act of congress includes the laws in relation to evidence, as well as the laws in relation to property. We think they are both embraced in it, and as by a law of Georgia the indorsements on these notes was made *prima facie* evidence that they had been so indorsed by the proper party, we think that the circuit court was bound to regard this law as a rule of evidence." The same ruling was repeated by this court in *Sims v. Hundley*, (6 Howard, 1,) upon a question whether a notary's certificate, made evidence by a statute of Mississippi, was admissible in the circuit court of the United States for that State. We said, it is true that upon general principles of commercial law, this certificate would not be admissible. But it is made evidence by the statutes of Mississippi; and the rules of evidence prescribed by the statute of a State are always followed in the courts of the United States when sitting in the State in commercial cases as well as in others.

Since these decisions were made, the judges of the United States courts have administered the laws of evidence of the States in conformity with them, and there was error in this case by the court below for not having done so. For such ruling, we direct that the judgment be reversed and order a *venire facias de novo*.



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Ogilvie v. The Knox Insurance Company.

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OGILVIE and others, Appellants, v. THE KNOX INSURANCE COMPANY  
and others.

2 Black, 539.

## FINAL DECREE ON APPEAL.

Where a decree against stockholders of a corporation in favor of creditors directs an equal distribution of assets among them, but appoints a master to collect those assets, and report to the court the amounts of all the assets, and a scheme of distribution, there is no final decree from which one class of creditors can appeal as against the others. They must await the master's report and the final order of distribution.

APPEAL from the circuit court for the district of Indiana. The matter is stated in the opinion, in which the appeal was dismissed.

*Mr. Gillet*, and *Mr. Judah*, for appellants.

*Mr. Gookins*, for appellees.

Mr. Justice GRIER delivered the opinion of the court.

When this case came before us on a \* former occasion, (see [ \* 540 ] 22 How., 380,) the decree of the circuit court dismissing the bill was reversed, and the record remanded, with instructions to that court to enter a decree for the complainants against the respondents, severally, for such amount as should appear was due and unpaid by each of them on their several shares of the capital stock of the Knox Insurance Company, and to have such other and further proceedings as to justice and right might appertain.

At the May term, 1860, of the circuit court, a decree was entered, in conformity with the judgment of this court, ascertaining the amount of the judgments due by the insurance company to the several complainants, and the several amounts due by each of the stockholders, respondents to the company. At the next November term divers other creditors of the company filed their petitions, setting forth that they also had become judgment creditors of the company, and praying to be made parties to the bill, and suggesting that there were other persons indebted to the company "whose indebtedness ought to be paid for the benefit of the petitioners;" that the amount found to be due from those against whom a decree has already been rendered was insufficient to liquidate the claims of the petitioners and other parties entitled to participate in the distribution of said funds; and praying that a receiver might be appointed to receive and collect from the persons so indebted the amounts due by them respectively, &c., &c. The court then appointed a receiver, according to the request of petitioners. But be-

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fore the funds of the company were collected, on the 7th of December, the court entered a decree that all the moneys recovered or to be recovered under the decree made at the last term be distributed among the original complainants and *the several persons* who had filed their petitions, praying to be made parties, complainants, &c., &c., and appointing a master to state an account, &c.

The appellants contend that this decree is erroneous and unjust to the original petitioners. This may possibly be found to be true when the proper time comes to have it reviewed. But the appeal as well as the decree is premature. There is no final [\* 541] \*decree in the case. After the assets are all collected by the receiver, so that the master may ascertain the amount to be distributed, the question now proposed will be properly raised, and decided on exceptions to the master's report. That report should state the amount of assets to be distributed, the amount collected from the original defendants, also the *other amounts* collected by the receiver from persons not in the decree; whether the amounts collected from the parties respondent are sufficient to pay each of the original parties complainant? if not, how much to each; how much other assets have been collected by the receiver, and how much would be coming to each creditor on the hypothesis that all the assets are to be divided among all the creditors equally.

With these facts ascertained, the court will be in a condition to make a final decree, which can be reviewed by this court, but not till then.

The appeal is therefore premature, and must be dismissed.

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J. F. CALLAN, Appellant, v. MAY.

2 Black, 541.

1. Where, after a sale under a decree in chancery, the purchaser of real estate obtains an order against one in possession, not a party to the suit, to be placed in possession under his purchase, this is not a final decree from which an appeal will lie.
2. It is merely the execution of the decree of the court; and if the party in possession is wrongfully dispossessed, he can have his remedy by bill in chancery, ejectment, or other appropriate remedy.
3. The special allowance of an appeal by a justice of this court is not conclusive on the court or on the judge who allows it.

APPEAL from the circuit court for the District of Columbia. The case is stated in the opinion. ,

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*Mr. Carlisle and Mr. May*, moved to dismiss the appeal.

*Mr. Coxe*, opposed.

\* Mr. Chief Justice TANEY delivered the opinion of the [\* 542] court.

This appeal must be dismissed. The application of May for process to obtain possession of the land was not a suit in which any final decree could be passed so as to give to either party a right to appeal. The proceedings in \* the circuit court [\* 543] after its decree was affirmed in the case of *Statham, Smithson & Co. v. Callan et al.*, were nothing more than proceedings required to carry into execution that decree. And when May had become the purchaser, and the sale was ratified by the court, and he had complied with the conditions of the sale, he was entitled, as a matter of course, to the process of the court to put him in possession. The order of the court directing process to issue is not such a final order or decree in a case as the act of 1789 contemplates. It is nothing more than an order of process to carry into execution a final decree already passed in a case in which May was not a party.

If there was any agreement between May and Callan, after May became the purchaser, whereby the land was leased to Callan for a term which is not yet expired, the remedy of Callan was by a bill in equity setting out the agreement, and praying that May might be enjoined from disturbing him in his possession. This would have been a new case in which a final decree might have been passed and an appeal legally taken. But such an agreement can furnish no ground for appeal from an order of the circuit court carrying into execution the mandate of this court in the case of *Statham, Smithson & Co. v. Callan et al.*, in which May was not a party and had no concern.

It seems to be supposed by counsel in the argument that the order of the judge of this court allowing the appeal was conclusive, and that its validity was not now open to dispute. But the allocatur of a judge was never so considered. Writs of error to State courts cannot issue without the allocatur of a judge of this court. Yet there is hardly a term in which a case of that description has not been dismissed upon the ground that the transcript did not show a case in which a writ of error would lie. A contrary doctrine would be exceedingly inconvenient if it could be maintained, and would throw upon a single judge the responsibility which properly belongs to the court. And it does not by any means follow that the judge who authorizes the appeal has made up his own mind that the party

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is legally entitled to it. He may, and no doubt often does, entertain doubts upon the subject, or may regard the point as [ \* 544 ] new \*and undecided, and upon which different opinions may be entertained, and in such cases he grants the appeal in order to bring the matter before the court and enable it to decide for itself whether the case is or is not within their appellate jurisdiction as regulated by the act of Congress. The allocatur of a single judge certainly cannot enlarge the appellate powers of this court beyond the limits prescribed by law, and that law does not authorize an appeal from an order directing execution to issue to enforce a judgment.

This appeal must therefore be dismissed.

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WRIGHT and others, Plaintiffs in Error, v. SILL.

2 Black, 544.

The court reiterates the proposition, that the act of the Ohio legislature of April 5, 1859, concerning taxation, impairs the obligation of the contract of that State with the bank on the same subject found in the 60th section of the act of 1845.

APPEAL from the circuit court for the northern district of Ohio.

No counsel on either side.

Mr. Justice SWAYNE delivered the opinion of the court.

This is a suit in equity, brought here by appeal from the circuit court of the United States for the northern district of Ohio.

The questions presented are, whether the 60th section of the act of the legislature of Ohio, entitled "An act to incorporate the State Bank of Ohio and other banking companies," passed February 24th, 1845, constitutes a contract upon the subject of taxation, which is binding upon the State; and, if so, whether that contract is impaired by the subsequent act of the legislature, passed April 5th, 1859, entitled "An act for the assessment and taxation of all the property in this State, and for levying taxes thereon according to its true value in money."

These questions came before this court the first time in the Piqua Branch of the State Bank of Ohio v. Knoop, (16 How. [ \* 545 ] \* 369,) and were resolved in the affirmative. They have since been repeatedly before the court, and have, uniformly, been decided in the same way. Dodge v. Woolsey, (18 How. 331;) Mechanics' and Traders' Bank v. Debolt, (18 How. 380;) Jefferson

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Parker v. Winnipiseogee Lake Cotton and Woolen Manufacturing Co.

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Branch Bank v. Skelley, (1 Black, 436 ;) Franklin Branch Bank v. The State of Ohio, (1 Black, 474.)

Whatever differences of opinion may have existed in this court originally in regard to these questions, or might now exist if they were open for reconsideration, it is sufficient to say that they are concluded by these adjudications. The argument upon both sides was exhausted in the earlier cases. It could subserve no useful purpose again to examine the subject.

The decree of the court below is affirmed, with costs.

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**PARKER, Appellant, v. THE WINNIPISEOGEE LAKE COTTON AND WOOLEN MANUFACTURING COMPANY.**

2 Black, 545.

**JURISDICTION IN EQUITY—PRACTICE IN EQUITY.**

1. The appellant, who is the owner of a water-power, alleges in his bill that defendants, by controlling the supply from Lake Winnipiseogee, and regulating its flow, have seriously injured his right in the water-power described, but does not state clearly in what that injury consists, nor does the evidence very clearly establish that there is any serious injury.
2. The bill does not allege an irreparable injury, or necessarily protracted litigation, or multiplicity of suits, as ground for equitable interference, nor any obstruction to an assertion of his rights by an action at law.
3. Under these circumstances this court holds that the circuit court was right in refusing any injunction or order to treat the acts of defendants as creating a nuisance until plaintiff has established his right by an action at law.

APPEAL from the circuit court for the district of New Hampshire.

*Mr. Curtis* for appellants.

*Mr. Hackett*, for appellees. !

Mr. Justice SWAYNE delivered the opinion of the court. [\*546] This is a suit in equity. The appellant filed his bill to procure a remedy against an alleged nuisance. The circuit court dismissed the bill. He thereupon appealed to this court.

It appears in the case that the appellant is the owner in fee simple of a certain parcel of land situated on the Winnipiseogee river, in the village of Meredith Bridge. He owns, also, in connection with this real estate, the right to use "one-half of the water, sufficient to carry wheels for operating a trip-hammer, grindstone, and bellows." He claims under Stephen Perley, whose title is undis-

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puted. Perley conveyed the land and the whole of the water-power mentioned to Daniel Tucker, by deed bearing date February 27, 1808. Tucker conveyed the same premises, on the 14th of April, 1832, to F. W. Boynton. The deed of Perley is referred to in Tucker's deed for a description of the land and water-right thereby conveyed. While the premises belonged to Tucker, the dam at Meredith Bridge was rebuilt. The amount to be paid by each of the parties interested in the water-power was fixed by arbitration. The arbitrators awarded that Tucker should pay two-twelfths of the cost of the dam "upon the Meredith side of the river," and he paid accordingly.

On the 29th of October, 1824, Boynton, by deed of that date, conveyed to Asa F. Parker. In this deed the water-right is thus described: "Which said water privilege is the right to draw one-half of the water from the flume connected with the premises." On the same day Asa F. Parker, by deed containing the same description of the premises, conveyed to the appellant.

The Winnipiseogee river has its source in Winnipiseogee Lake.

The lake has its outlet at a place called *the Weirs*, six [ \* 547 ] \* miles above the village of Meredith Bridge. The outlet was formerly, by a natural channel, from five to seven hundred feet in length. The water discharges itself from this channel into Long Bay—a sheet of water about four and a half miles long, and from half a mile to a mile wide. At the foot of Long Bay the water is again discharged by a channel about a thousand feet long into "Little Bay." At the outlet from Long Bay is Lake Village. From Little Bay the water is discharged into Sanborton Bay, by a channel about fifteen hundred feet in length. At the outlet of Little Bay is Meredith village, where the premises of the complainant are situated. Little Bay forms the headwater of the dam from which appellant's water-power is supplied. The water is discharged out of Sanborton Bay, at or near a place called Union Bridge, and thence pursues its course, about ten or twelve miles, to its confluence with the Pemigewasset, below which the united streams take the name of the Merrimac river. This river—receiving several affluents on its way—passes by and supplies with their water-power the manufacturing towns of Lowell and Lawrence.

The dam at Meredith Bridge was built prior to 1808. There is a dam at Lake Village, which was built in 1829.

After Perley conveyed to Tucker, he cut a canal through his own land, tapping Little Bay, above the dam at Meredith Bridge, and discharging into the river, below the dam, at its entrance into Sanborton Bay.

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The defendant is a corporation, created and clothed with its powers by acts of the legislature of New Hampshire. Its stock is owned by the great manufacturing companies of Lowell and Lawrence, except a few shares, held for purposes of convenience, by individuals. The main object of its creation was to secure a more abundant and regular supply of water for the mills at those places. This was to be accomplished by making Lake Winnipiseogee a vast reservoir of water, to be accumulated and retained in wet weather, and to be drawn off and passed down the stream, as it might be needed, in dry weather.

The flow of water below the lake was thus to be equalized, as far as practicable, throughout the year.

\* With a view to this object, the defendant has bought [ \*548 ] up all the water-rights relating to the lake, and all those upon the river above, and for some distance below, Meredith Bridge. Those holding such rights at that village have been compromised with, except the appellant. The answer avers that he was offered the same that was paid to others, and that he refused—seeking to extort an unreasonable and unconscionable sum.

The defendants made excavations at the Weirs in 1845-'6, whereby the lake can be drawn down from four to six feet lower than was before possible.

They erected a new stone dam at Lake Village in 1851. By means of this dam they can arrest the flow of the water so as to raise it above the intermediate descents back to the lake, and raise the water in the lake and retain it there.

They have enlarged the Perley canal and increased the flow of water through it. This was done in 1846.

In making their purchases and improvements, the defendants have expended about \$300,000. All was done without any objection from the appellant.

It is admitted by the answer, that the defendants intend to make still deeper excavations at the Weirs, and that they have controlled and intend hereafter to control the waters of the lake, both by retention and discharge, so as to equalize at all times throughout the year, as far as practicable, the flow of water below the outlet of the lake.

The gravamen of the appellant's grievances is thus alleged in this bill:

“ And the said defendants have thus caused a proportionate inequality in the quantity of water flowing in the river Winnipiseogee, by the premises of your orator, greater than any inequality which naturally arose from the ordinary changes of the season, or from

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the ordinary fluctuations in the head of water in the said lake before the attempted regulation of the same by the said defendants—to the molestation, damage, and injury of your orator in the use and improvement of the said mill privilege and water-power aforesaid.”

“And your orator further represents, that his said [ \* 549 ] water-power \* is damaged to the same extent as the equality of supply of water at all seasons is disturbed.

“And that the defendants, with the intent and design to deprive your orator of his just rights, have seized upon and taken possession of the waters of the said Winnipiseogee lake and river, to regulate and control them as aforesaid, and to use the said lake as a reservoir, out of which to supply the Merrimac river with water in time of drouth, and to use the said Winnipiseogee river as a channel through which to regulate and control such supply, whenever and as often as the supply of water in the Merrimac from other sources may fail, or become insufficient for a motive power for the use of the manufacturing establishments situated thereon, and for the benefit, profit, and advantage of such manufacturing establishments, their owners or occupants, or parties interested therein, or some of them, and to the hurt and damage of your orator in the use, value, and capacity for improvement of his said water-power at Meredith Bridge aforesaid.”

In reply to these allegations, the defendants say, “that they have, ever since said dam and excavation were made, used and occupied the same for the purpose of giving greater regularity and steadiness to the flow of water in said river, and to reserve and hold back the surplus water, which would, at wet seasons and during spring freshets, have otherwise run to waste, retarding and interfering with the operation and use of the mills upon said Winnipiseogee and Merrimac rivers, and discharging the same at such times as the same was required in consequence of low state of the waters in said rivers for the use thereof, and that the water of said lake and bay has been so managed and used as to be a material benefit and advantage to the mills upon said rivers.”

“And the defendants deny that they have in any manner caused a proportional inequality in the quantity of water flowing in the river Winnipiseogee, by the premises of said complainant, greater either than any inequality which naturally arose from the ordinary changes of the seasons, or from the ordinary fluctuations [ \* 550 ] in the head of water in the said lake \* before the regulation of the same by the said defendants, to the molestation, damage, or injury of said orator, in the improvement of his said



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mill privilege and water-power. And said defendants further say, that said complainants' water-power is not damaged by anything which has been done by them, the equality of the supply of water being not otherwise disturbed by them than is in this answer hereinbefore set forth, and its supply being rendered more equal at times when it was formerly scanty, and the excess of water being prevented at periods of high water, which would not aid, but would retard by backwater the operation of said complainants' mill."

The issue between the parties is thus presented. Several other matters of defense are set forth in the answer. The view which we have taken of the case renders it unnecessary particularly to advert to them.

The appellant alleges an injury to his water-right commensurate, in extent, with the additional inequality in the flow of water in the river, which he alleges to have been caused by the works of the defendants.

They deny the injury, and claim that his water-power is improved. The appellant does not state in his bill how the injury is produced, nor in what it consists. The particular nature of the injury is unexplained. He complains neither of a diminished supply of water nor of back-water. We have looked carefully into the evidence upon the subject; the result is, that we are left in doubt upon which side lies the truth. We have failed to find those clear facts of rights upon one side, and wrong upon the other, which are necessary to quicken into activity the powers of a court of equity. We forbear to pursue this inquiry, because the case presents another ground, free from doubt, upon which we prefer to rest our decision.

It was urged at hearing, as an insuperable objection to the relief prayed for, that the appellant has not established his right by an action at law. The objection was not taken by demurrer, or in the answer. In the courts of the United States, it is regarded as jurisdictional, and may be enforced by the court *sua sponte*, though not raised by the pleadings, nor suggested by \*coun- [ \* 551 ] sel. (2 Cr. 419; 5 Pet. 496; 2 How. 383.) The 16th section of the judicial act of 1789 provides, "that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy can be had at law." This is merely declaratory of the pre-existing rule, and does not apply where the remedy at law is not "plain, adequate, and complete," or, in other words, where it is not "as practical and as efficient to the ends of justice and to its prompt administration as the remedy in equity." (3 Pet. 215.) But where the remedy at law is of this character, the party seeking redress must pursue it. In

such case the adverse party has a constitutional right to a trial by jury. (19 How. 278.)

The concurrent jurisdiction of courts of equity in cases of private nuisance dates back to an early period in the growth of the English equity system. (1 Spence, 672.) It has been greatly enlarged since the time of Lord Thurlow. (7 Vesey, 307, 308; 33 Cond. Eng. Ch. Rep. 236.) It is now too firmly established to be shaken, but it is not without limitation. It is governed by the same principles which animate and control its action in other cases where its aid may be invoked against a wrongdoer.

Many cases of private nuisance will sustain an action at law which will not justify relief in equity. (16 Vesey, 338; Story's Eq. Jur., sec. 925.)

A court of equity will interfere when the injury by the wrongful act of the adverse party will be irreparable, as where the loss of health, the loss of trade, the destruction of the means of subsistence, or the ruin of the property must ensue. (2 Swanst. 335; 16 Vesey, 342; 2 Ver. 646; 2 Bro. C. R. 64; 10 Vesey, 163; 6 Paige, 83; Wat. Eden, 659, note.)

It will also give its aid to prevent oppressive and interminable litigation, or a multiplicity of suits, or where the injury is of such a nature that it cannot be adequately compensated by damages at law, or is such, as from its continuance or permanent mischief, must occasion a constantly-recurring grievance, which cannot be prevented otherwise than by an injunction. (Mitf. Eq. Pl., by Jeremy, 144, 145; Jer. Eq. 300; 1 Dick. 163; 16 Ves. 342; 6 J. C. R. 46; 6 Paige, 83.)

[\* 552] \*A diminution of the value of the premises without irreparable injury is no ground for interference. (2 Bro. C. C. 65; 16 Vesey, 342; 3 M. & K. 169.)

Where an injunction is granted without a trial at law, it is usually upon the principle of preserving the property, until a trial at law can be had. A strong *prima facie* case of right must be shown, and there must have been no improper delay. The court will consider all the circumstances and exercise a careful discretion. (Cr. & Ph. 283.)

Where an injunction in such a case has been granted, and the complainant fails to proceed with diligence in his action at law, the injunction will be dissolved. (4 M. & C. 498.)

A delay of three years or more has been frequently held to be such laches as will preclude a party from relief in equity until he has vindicated his right at law. (1 Cox, 102; 2 J. C. R. 379; 3 J. C. R. 282; 6 J. C. R. 19; 5 Met. 8.)

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The better opinion now is, that it is only a fact to be considered by the chancellor, in connection with the other facts of the case, by which his discretion is to be guided. *Wood v. Sutcliff*, (8 Eng. L. & E. 217;) *Sprague v. Rhodes*, (4 Rhode I. 304.)

"Until the rights of the parties are settled at law, only a temporary injunction is issued, to prevent irreparable injury." *Irwin v. Dixon*, (9 How. 10.)

This jurisdiction is applied only where the right is clearly established—where no adequate compensation can be made in damages, and where delay itself would be a wrong. (2 Swanst. 316; *Angel on Wat. Courses*, 475.)

The case must be one "of strong and imperious necessity, or the right must have been previously established at law." (6 Barb. S. C. R. 160; 7 Barb. S. C. R. 400; 2 J. C. R. 164; 4 B. & C. 8; 37 New H. 254; 17 Maine, 202.) The right must be clear and its violation palpable. (6 Barb. S. C. R. 160.)

If the evidence be conflicting and the injury doubtful, this extraordinary remedy will be withheld. (3 Paige, 210; 1 Cooper's Sel. Cas. 333; 3 M. & K. 169; 5 Met. 8; 9 Gill. & J. 668; 3 J. C. R. 282; 2 Barb. Ch. R. 282; 1 Dev. Eq. R. 12.)

After the right has been established at law, a court of \*chancery will not, *as of course*, interpose by injunction. [\* 553] It will consider all the circumstances, the consequences of such action, and the real equity of the case. (4 Rhode I. 301; 8 E. L. & E. 217; 9 E. L. & E. 104; 18 Eng. Cond. Ch. R. 436.)

The estate of the appellant in the water is an easement or servitude annexed to his land. As before stated, the excavation was made at the Weirs, and the Perley canal was deepened in 1846. The stone dam was erected in 1851. The appellant brought his bill on the 18th of September, 1855. During these intervening periods, according to his own showing, he slept upon his rights. (8 E. L. & E., 223.) He does not allege either danger or irreparable injury, or of protracted litigation, or of a multiplicity of suits, as the ground upon which he seeks relief in equity. There is no warrant for such an averment. If he has been injured, his injury can be ascertained and fully repaired by damages in an action of law. A jury is the tribunal provided by law to determine the facts and to fix the amount, and they can best perform this duty. The fact that other proprietors have been paid bears upon this point. (8 E. L. & E., 222, 223.) The appellant can have no standing in a court of equity until he has laid this foundation for relief. This objection is fatal to the case. We decide nothing else.

There are cases in which a court of equity will take jurisdiction

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and give a complete remedy without the previous intervention of a court of law. (6 Ves. 689; 1 McLean, 355; 39 New H. 186; 8 E. L. & E. 217; 4 Rhode I. 301; 4 M. & Cr. 433; 3 Hare, 593; 2 Coll. 431; 7 Hare, 221.) But this case does not belong to that class.

The circuit court committed no error in dismissing the appellant's bill.

The decree below is affirmed, with costs.

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**JAMES A. LINDSEY and others, Appellants, v. HAWES.**

2 Black, 554.

**ACTION OF LAND OFFICER IN ISSUING PATENT MAY BE REVIEWED IN EQUITY—PRE-EMPTION—RESIDENCE ON BOUNDARY LINE.**

1. On a re-examination of the adjudged cases, this court holds that, when a pre-emptor has proved his claim, paid his money, and received a certificate of entry from the proper land officer, the action of the commissioner of the land office in setting aside his entry, without notice to him or his heirs, and selling and giving a patent for it to another, does not preclude the party first mentioned from asserting his rights in a court of equity.
2. When the government has made a survey of its lands, with a plat which has been approved by the proper officer, and by that survey has sold the land and received the money for it, and given a certificate of purchase, it is bound by the survey and sale, and cannot of its own motion make a new survey, so as to defeat the title it had sold, by showing that the pre-emptor did not occupy the specific congressional subdivision which he had rightfully claimed to do by the first survey.
3. But this is not intended to deny the right of the government to compel payment for any additional quantity of land found to be included in the sale by the new survey.
4. Taking the original survey as furnishing the lines by which plaintiff's occupation and residence on the land he claimed is determined, it is established as a fact that his house was on the dividing line between two quarter sections, one of which he pre-empted. This was a residence in both, and authorized him to select in which he would claim the right of entry, as he had possession of both.
5. The plaintiffs, the heirs of the pre-emptor, are therefore entitled to conveyance of the legal title from the defendants, who hold the legal title by patent from the United States, which equitably belongs to plaintiffs.

APPEAL from the circuit court for the northern district of Illinois  
The case is fully stated in the opinion.

*Mr. Grant*, for appellants.

*Mr. Scates*, for appellees.

Mr. Justice MILLER delivered the opinion of the court.

This is an appeal from a decree of the circuit court for the northern

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district of Illinois, in which the appellants here were claimants there.

The subject of the litigation is the legal title to the southwest part of the northeast fractional quarter of section No. 36, in township No. 18, of range No. 2 west, of the fourth principal meridian, in the county of Rock Island, Illinois. The course of the Mississippi river at this point is almost due west, and that portion of its waters which flows south of the island of Rock Island divides the northeast quarter of section 36 into two parts, one of which, the smaller, is south of the stream, and the other constitutes a portion of the island.

The section was surveyed in the year 1833 by Bennett, the \*government surveyor, and the survey duly filed in [ \* 555 ] the proper office. The meanders of the Mississippi river, the quarter section posts, and the area of the fractional quarters, were all given by the survey. It appeared by it, that the south line of the quarter section impinged upon the river at a point near the centre of the line, and thus divided that part of the quarter which was south of the river into two separate fractions. The computation of this survey gave the contents of the east fraction at  $1\frac{87}{100}$  acres, and of the west fraction at  $5\frac{17}{100}$  acres. It is this latter parcel which is in contest. In April, 1839, Thomas Lindsey made application to the receiver and register of the land office at Galena to purchase the land, claiming a right of pre-emption under the act of 1838 by reason of cultivation and actual residence thereon, and having established his claim to the satisfaction of those officers, he received from them on the 3d day of June, 1839, the proper certificate stating the receipt of the purchase-money, and that, on its presentation to the commissioner of the general land office, he would be entitled to a patent. Shortly after receiving this certificate, Thomas Lindsey removed with his family across the river into Iowa, and died on the 14th September of the same year, a little more than three months after its date. The present plaintiffs are his heirs, and were all, at the time of his death, either minors or *femes covert*, except James A. Lindsey. No patent ever issued to Thomas Lindsey or his heirs on this entry.

In 1845 David Hawes claimed a pre-emption right under the act of 1841 for the same fractional southwest part of the northeast quarter of section 36, and in December received the certificate of the register and receiver that he had purchased and entered it, and on March 1st, 1848, received from the government a patent.

The object of the present suit is to compel from said David Hawes and the other defendants, who are his grantees, a conveyance to

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plaintiffs of the legal title thus obtained by Hawes from the government.

As Hawes took his patent from the United States with full knowledge of the certificate previously issued to Lindsey, it is [ \* 556 ] \* quite clear that upon the facts above stated, without more, the complainants would be entitled to the relief prayed for in their bill. But the defendant Hawes, who alone has answered, sets up other facts upon which he relies as a full defense to the claim of the plaintiffs. There are in the record the depositions of some forty witnesses, besides letters and other documentary evidence, all of which have received the careful attention of the court; although it will be found that the case must be decided upon a few facts about the truth of which there is but little conflict. These will be considered as we progress.

On the 9th August, 1845, James Shields, commissioner of the land office, set aside the entry of Lindsey, ordered his certificate to be canceled, and directed the register and receiver to hear proof of the right of David Hawes, and to adjudicate his claim.

They accordingly heard his proof, and gave him the certificate, on which he afterwards obtained his patent as before recited. It is claimed by the counsel of Hawes that this action of the land officers, including that of the commissioner, was a conclusive and final adjudication of the matters now set up in plaintiffs' bill, and that the courts of law cannot go behind these proceedings to correct any injustice which may have been done to plaintiffs.

The proposition as thus broadly stated, and as necessarily so stated by defendant's counsel to avail him in this case, cannot be conceded. It appears from the evidence before us, that the ground on which the commissioner set aside the entry of Lindsey, was, that there had been a mistake in the survey made by Bennett in 1833, and that by another survey made by order of the commissioner in 1844, it was ascertained that the house in which Lindsey resided when he made his claim in 1839, was not on the land for which he received his certificate of entry from the receiver and register.

The order for this new survey emanated from the commissioner of the land office June 1st, 1844, and the survey was actually made in the autumn of that year, five years after Lindsey's entry, and five years also after his death, and there is no [ \* 557 ] \* proof whatever that any of his heirs had notice of this survey, or of any intention on the part of the commissioner to set aside Lindsey's entry; but the whole proceeding was *ex parte*. It is true that subsequently, when the claim of David Hawes to a right to enter this land came before the register and re-

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ceiver, James A. Lindsey seems to have had some kind of notice ; but this was given him in regard to an attempt on his part to enter this land for himself, on a claim of improvement made by himself, having, as is clearly shown, no relation whatever to the right established by his father, Thomas Lindsey. Nor did the other heirs of Thomas Lindsey have any notice of the proceedings by which David Hawes established his claim before the register and receiver. These heirs were not in any sense parties to any of the proceedings by which the title to the land which their ancestor had bought of the government was vested in David Hawes, and their claim annulled.

Under these circumstances we have no hesitation in holding that the action of the officers of the land office was *not* conclusive upon their rights, and that a court of equity may inquire into the proceedings by which the title was vested in Hawes, and afford relief if a proper cause for it is shown to exist. That this is the settled doctrine of this court, a reference to a few of its decisions will show.

In the case of *Cunningham v. Ashley et al.*, (14 Howard, 377,) Cunningham appeared before the receiver and register, and claimed the right, under the pre-emption laws, to enter the land which was the subject of controversy. These officers decided that he had no right to do so, and rejected his claim. He again and repeatedly presented his claim, and tendered the price of the land. His claim received the consideration of the commissioner of the land office, of the attorney general, and of the secretary of the treasury, and was finally rejected. The defendants were permitted to enter the land, and receive from the government patents for it. Justice McLean, in delivering the opinion of the court, says, that this final decision of the officers of the department was the result of twenty years of controversy; and speaking in reference to the plaintiff's rights, he says: "They \*were paramount to [\* 558] those acquired under the new location. Those rights were founded on the settlement and improvement in 1821, and on the acts done subsequently in the prosecution of his claim. Having done everything which was in his power to do, the law requires nothing more." Again: "So far as the new entries interfered with the right of complainants, they were void." "The officers of the government are the agents of the law. They cannot act beyond its provisions, nor make compromises not sanctioned by it. The court decreed that the defendants should convey to Cunningham, who had the paramount equity. In this case, which had been long contested, and had received the consideration of the receiver, register, commissioner, attorney general, and secretary of the treasury, all of

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whom had concurred in rejecting plaintiff's claim, he had never received any certificate nor actually paid any money, yet the court held that it would look into the equities of the case and set aside the acts of all these officers, because they had erred, to use the language of the court, both as to the law and the facts to the prejudice of complainant." In *Barnard's Heirs v. Ashley's Heirs*, (18 How. 43,) this court again decided that it would inquire into the facts of a disputed entry, notwithstanding the decision of the register and receiver.

But the clearest statement of the rule established by this court on this subject is to be found in the case of *Garland v. Wynn*, (20 How. 8.) Wynn's entry, which was the elder, had been set aside, and the money refunded and a patent certificate awarded to Hemphill, who assigned to Garland, to whom the patent issued. Wynn brought his suit in equity to compel from Garland the conveyance of the legal title, on the ground that these proceedings were illegal, and that he had the equitable right. Garland insisted that the circuit court had no authority or jurisdiction to set aside or correct the decision of the register and receiver, and that their adjudication was conclusive. Mr. Justice Catron, in delivering the opinion of the court, says: "The general rule is that where several parties set up conflicting claims to property, with which a special tribunal may deal, as between one party and government, regardless of [ \* 559 ] the rights of others, \* the latter may come into the ordinary courts of justice and litigate the conflicting claims. Such was the case of *Comegys v. Vasse*, (1 Peters, 212,) and the case before us belongs to the same class of *ex parte* proceedings. Nor do the regulations of the commissioner of the general land office, whereby a party may be heard to prove his better claim to enter, oust the jurisdiction of the courts of justice. *We announce this to be the settled doctrine of this court.*" In *Lyttle et al. v. State of Arkansas et al.*, (22 How. 192,) the same member of the court, delivering its opinion, says: "Another preliminary question is presented on this record, namely, whether the *adjudication* of the register and receiver which authorized Cloy's heirs to enter the land is subject to revision in courts of justice, on proof showing that the entry was obtained by fraud, and the imposition of false testimony on those officers as to settlement and cultivation. We deem this question too well settled in the affirmative for discussion."

We are not now disposed to question the soundness of these decisions, and they clearly dispose of the objection raised by defendants on this branch of the case.

We now proceed to inquire into the grounds upon which the



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entry of Thomas Lindsey was set aside, and the application of David Hawes to enter the same land was allowed. It appears that some five years after Lindsey's entry was made, upon the suggestion of Silas Reed, that there was an error in Bennett's survey of this quarter, the commissioner ordered a new survey to be made of that section. This survey was made for the government by George B. Sargent in the fall of 1844. It differed from the original survey in two particulars, namely, that the southwest fractional quarter was found to contain  $13\frac{23}{100}$  acres, instead of  $5\frac{17}{100}$ , and the south line of the quarter section was located so far north as to leave the house in which Lindsey resided, when he made his entry, entirely south of the quarter.

The act of June 22, 1838, under which Lindsey claimed his right of pre-emption and made his entry, provides, "That every actual settler of the public lands, being the head of a family, \* over twenty-one years of age, who was in possession, and [ \* 560 ] a housekeeper, by personal residence thereon at the time of the passage of this act, and for four months next preceding, shall be entitled to all the benefits and privileges of an act entitled 'An act to grant pre-emption rights to settlers on public lands.' " It is shown by the letter of James Shields, commissioner of the general land office, dated August 9th, 1845, to the register and receiver at Dixon, that Lindsey's entry was set aside by him because, by the re-survey, Lindsey's house was not on the fractional quarter in controversy. We are not prepared to admit, that if the second survey be the correct and proper subdivision of that section into quarters and fractions of quarters, and that by this survey (though otherwise by the former) the house of Lindsey was found not to be in the fraction pre-empted by him, the commissioner could, for this reason alone, set aside, in this summary manner, the sale of the land made by the government to Lindsey. It is to be remembered that the original survey of Bennett was the survey of the government; that it was made in 1833; that the maps, plats, certificates, and field notes were all filed in the proper office; the survey approved, and that for eleven years the government had acted upon and recognized it as valid and correct, and above all had sold the land to Lindsey by this its own survey, received the purchase money and given him a patent certificate, five years before any suggestion was made of this error. The money thus received by the government has never been returned, nor do we think it would vary the rights of the parties if it had been actually tendered to him or his heirs. We are of opinion, under these circumstances, that so far as the location of the lines of that quarter section affect the ques-

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tion of the precise locality of Lindsey's residence, as bearing on his right to enter that fraction as a pre-emption, the government was bound by the original survey of Bennett.

We do not here deny the right of the Government, which has sold land by the acre at a fixed price, to make a new survey before it parts with the title, and if there is more land than [ \* 561 ] \* was paid for, to require the deficiency to be paid before it issues a patent.

On that subject we decide nothing, because it is not necessary in this case. Lindsey's heirs were never notified of the additional number of acres found to be in the fraction, nor were they required or permitted to pay for this increase.

The language of the act of 1838, already quoted, certainly required of Lindsey that he should have possession, by personal residence thereon, of the land which he entered, and if he had not such residence, or rather such possession, the commissioner was justified in vacating the entry. But this fact must be determined on the basis of Bennett's survey.

On this point a few facts found among the mass of testimony in the record, about which there is scarcely a dispute, will enable us to form a just conclusion.

The east and west lines which divide a section into north and south quarter sections, are not usually run out and marked by the government surveyors; but instead of this, as they run the north and south lines, they set up on these lines what they call the quarter-section posts—that is, they mark the points where this line should begin and end. When Lindsey was about to make his pre-emption claim, in order to ascertain whether he resided on this fraction, he procured the county surveyor of Rock Island county to come and run this quarter-section line. Several of the witnesses who were present when this survey was made have testified in the case, and C. H. Stoddard, a practical surveyor of intelligence and candor, as shown by his testimony, also made a survey from Bennett's field notes since this suit was instituted. Some of the persons present when the survey was made by Baxter, the surveyor of Rock Island county, looked through the compass and observed where the line struck Lindsey's house, and a notch was made on his stone chimney where the line was seen to touch it, which was there when the depositions were taken in this suit, and was identified by witnesses who saw it made. The fair result of all the testimony on this point is, that the house in which Lindsey resided was directly on this line, which would intersect the house so as to

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Lindsey v. Hawes.

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\* throw perhaps the larger part on the other quarter, and [ \* 562 ] a part something less than half into this quarter.

It is proved that he had another building on *this* fraction wholly, which is sometimes spoken of as his stable, and sometimes as a blacksmith shop, in which he worked at that trade. It is also shown that the ground cultivated by him was exclusively on this fraction, and the proof of its cultivation and inclosure is quite clear. On these facts, was he, within the meaning of the statute, in possession of this fraction by personal residence thereon?

The counsel for appellees has made a vigorous argument in support of the negative of this question. Assuming that Lindsey could not have a residence on both the northeast and southeast quarter sections at one time, and claiming that the case is to be governed by the analogies of a question of domicile in a case of conflicting jurisdictions, he has made an apparently strong case out of the fact that the larger portion of the house is on the south side of the line. This, however, is not a case of domicile under different governments or conflicting jurisdictions. It is a question arising under the government of the United States, and concerns a construction of one of its most benevolent statutes, made for the benefit of its own citizens, inviting and encouraging them to settle upon its public lands. The government which made the law owned both quarter sections, and was indifferent as to which should be sold to Lindsey, provided it was legally done. Lindsey's house was on both quarter sections. He lived or resided in all that house. So far as mere personal residence is concerned, we think he may be correctly said to have resided on both quarter sections. The law only required that he should personally reside on the quarter which he claimed to enter, and if he resided on both, then clearly he resided on this one.

But the language of the act makes *possession* the principal matter, and personal residence the qualifying matter. Leaving out the word housekeeper, which is not in question, the qualification of a person who can pre-empt under the act, is one "who was in possession by personal residence thereon." Now \* that [ \* 563 ] Lindsey was in possession is shown by his stable or blacksmith shop, by his enclosure and cultivation of the ground, or a part of it. When, in addition to these facts, a considerable part of the house in which he and his family lived, was also on this little five-acre piece of ground, may it not be said that he had possession of it by personal residence thereon?

We are of opinion that on the true construction of the statute he had. It follows from what we have said that the patent certificate issued to Thomas Lindsey was rightfully issued by the receiver and

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Dredge v. Forsyth.

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register, that the act of the commissioner in setting it aside was illegal, and did not destroy the right thus vested, that the land was not subject to entry by David Hawes, and that the patent obtained by him was wrongfully and illegally issued to him, and that the plaintiffs are entitled to a conveyance of the legal title from him and his co-defendants.

The decree of the circuit court is therefore reversed, and the case remanded to that court, with instructions to enter a decree in conformity with this opinion.

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JOHN A. DREDGE and others, Plaintiffs in Error, v. FORSYTH.

2 Black, 563.

PEORIA LOTS—LIMITATION—ADVERSE POSSESSION.

1. Where a bill of exceptions shows on its face that exceptions were taken at the time of the ruling of the court, it is immaterial as to what time during the term they were reduced to writing and signed by the judge and filed with the clerk.
2. This court re-affirms the proposition that a patent, though prior in date, which is expressly made subject to the rights of settlers in the village of Peoria, is not paramount to the title thus recognized, when it is established, though by a junior patent.
3. But such senior patent may, when the survey has not located the village settler's right, be a color of title under which a person may have such adverse possession as will form the better right under the seven years' limitation law of Illinois.
4. A residence on one of several lots or subdivisions, included in his patent, with assertion of claim to the whole, will be construed as adverse possession of the whole, when there is no actual possession under the better title.

WRIT of error to the circuit court for the northern district of Illinois. The case is stated in the opinion.

*Mr. Charles Ballance*, for plaintiff.

*Mr. Archibald Williams*, for defendant.

[ \* 564 ] \*Mr. Justice CLIFFORD delivered the opinion of the court.

This was an action of ejectment, and the case comes before the court upon a writ of error to the circuit court of the United States for the northern district of Illinois. Suit was brought in the court below by the present defendant against John Dredge, John A. Keys, and Jesse Hester, to recover possession of a certain parcel of land described in the declaration as part of claims forty-five and sixty-nine, and part of claims sixty-two and sixty-three, in the village of Peoria, in the State of Illinois, and also by metes and bounds. Plaintiff alleged that on the first day of July, 1855, he

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was possessed of the described tract, and that the defendants on the following day entered into the premises, and have ever since that time unlawfully withheld the same. Defendants appeared and pleaded the general issue, and by consent of parties their landlord, Charles \*Ballance, was, on the twenty-third day [ \*565 ] of July, 1856, made a co-defendant in the suit. Issue being joined, the parties went to trial, and the jury returned their verdict in favor of the plaintiff, and judgment was subsequently entered on the verdict; but upon motion of the defendants, and satisfactory proof exhibited by them that they had paid all the taxable costs, the judgment was vacated and set aside by the order of the court, and a new trial was granted. No further proceedings were had in the cause until the July term, 1857, when the parties again went to trial upon the general issue. Title was claimed by the plaintiff under a patent from the United States to the legal representatives of one Antoine Lapance, who was an inhabitant or settler within the purview of the act of the third of March, 1823, entitled "An act to confirm certain claims to lots in the village of Peoria, in the State of Illinois." He accordingly introduced the patent, and deraigned his title from the patentees therein described. Recurring to the patent, it will be seen that it bears date the first day of February, 1847, and was issued for a certain lot of land surveyed and designated, as covered by claims sixty-two and sixty-three, in the southwest fractional quarter of fractional section nine, in township eight north, of range eight east, of the fourth principal meridian, in the State of Illinois. Survey on which the patent is founded was approved on the first day of September, 1840, and it is not controverted that the ancestor of the patentees was one of the inhabitants or settlers described in the act of congress under which the patent was granted. Two plats were also introduced by the plaintiff, which were objected to by the defendants, upon the ground that they were certified by the surveyor of public lands, and not by the secretary of the treasury. One was a plat of the village of Peoria, and the other was a plat of claim or lot sixty-three; but the court overruled the objections of the defendants, and the plats were admitted in evidence. Certain portions of Edward Cole's report, made to the secretary of the treasury on the tenth day of November, 1820, were also offered by the plaintiff, to be read in evidence, as appears in the third volume of American State Papers, relative to the public lands. Objection \*to the [ \*566 ] admissibility of the volume was duly made by the defendants, on the ground that it was not properly authenticated, but the court overruled the objection, and so much of the report as relates

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to the claim in controversy was read to the jury. Various deeds also from the heirs of Antoine Lapance to the plaintiff, or to those under whom he claims, were given in evidence by the plaintiff, and he also introduced a duly certified copy of a certain chancery proceeding for partition, which resulted in a decree of sale of the interests of several of the parties under whom the plaintiff derived his title as a purchaser. Those proceedings were introduced to show that the interests of parties owning one-third of the premises in common with the plaintiff were duly sold by a commissioner of the court in which the proceedings took place, and that the same became vested in the plaintiff, as a purchaser at a legal sale. Such was the substance of the evidence offered by the plaintiff, as more fully set forth in the transcript. On the other hand, the defendants claimed title under a patent dated the twenty-fourth day of January, 1838, as issued to Charles Ballance, granting to him the southwest fractional quarter of section nine, in township eight north, of range eight east, in the district of lands subject to sale at Quincy, Illinois, "subject, however, to the rights of any and all persons claiming under the act of congress of the third of March, 1823," to which reference has already been made. They accordingly gave the patent in evidence, together with a duplicate of the receipt given by the receiver of the land office, and the certificate of the register, on which the patent is founded. Relying on these evidences of title, the defendants also offered evidence tending to show that Charles Ballance, or those claiming under him, had been in possession of the premises, claiming title to the same, from 1842 to the commencement of this suit. Much testimony was taken as to the possession of the premises, but inasmuch as the plaintiff now concedes that the defendants occupied the same from 1842 to the commencement of the suit, the testimony will not be very fully reproduced.

On this state of the case the defendants requested the court to instruct the jury: 1. That the title exhibited by them [ \* 567 ] was \*superior in point of law to that exhibited by the plaintiff. 2. That the title of the defendants was a regular chain of title, deducible of record from the United States, and if they believed from the evidence that the defendants, and those under whom they received the possession, had been in actual possession, by residence, of the premises more than seven years immediately preceding the commencement of the suit, and were still in possession when the suit was brought, then the plaintiff was not entitled to recover in this action. Other prayers for instruction were also presented by the defendants; but in the view we have taken of the case it will not be necessary to refer to any other at the present

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time. Both of these requests were refused by the court, and the jury, among other things, were told: 1. That the defendant, Ballance, acquired no absolute title to the lot in question under his patent from the United States; but that the other title, under the act of 1823, was the paramount title. 2. That in order to be protected under the law of 1835, he, or those claiming under him, must have had possession by actual residence on the land in controversy for seven years next preceding the commencement of this suit. Under these instructions, and others which need not be noticed, the jury found that the defendants were guilty of unlawfully withholding from the possession of the plaintiff so much of claim sixty-three as is covered by the southwesterly half of lot numbered one, in block forty-seven, in Ballance's addition to the town of Peoria.

1. Verdict was rendered on the 3d day of August, 1857, but the bill of exceptions was not filed in court until a subsequent day in the same term; and it is contended by the plaintiff that the record does not show that the exceptions were duly taken before the jury retired from the bar of the court. But the objection is entirely without merit, so far as respects the prayers for instruction presented by the defendants, and the instructions given to the jury, as will appear by an examination of the statement which immediately precedes the bill of exceptions, as well as by the closing paragraph of the same. Just preceding the formal part of the bill of exceptions is the statement in the record that "the following exceptions were made by the defendants \* upon the trial [\* 568] of this cause," and that the same "were allowed by the court;" and immediately following the instructions given to the jury is the additional statement, that the "defendants then and there excepted" to the decisions and rulings of the court. Undoubtedly the rule is that the record must show that the exception relied on was taken and reserved by the party at the trial; but it is a mistake to suppose that it has ever been held by this court that it must be drawn out and sealed by the judge before the jury retire from the bar of the court. Great inconvenience would result from such a requirement, and in point of fact there is no such rule. On the contrary, it is always allowable, if the exception be seasonably taken and reserved, that it may be drawn out in form and sealed by the judge afterwards; and the time within which it may be so drawn out and presented to the court must depend on the rules and practice of the court, and the judicial discretion of the presiding justice. Such was the rule laid down by this court in *United States v. Brietling*, (20 How. 254,) and we see no reason to qualify it on

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the present occasion. See also *Phelps v. Mayer*, (15 How. 160;) *Turner v. Yates*, (16 How. 28.)

2. Certain exceptions were also taken by the defendants to the ruling of the court in admitting evidence offered by the plaintiff, as before explained, but inasmuch as the objections are the same as those which came before the court in *Gregg et al. v. Forsyth*, (24 How. 179,) we do not think it necessary to give them any further examination, and they are accordingly overruled.

3. Repeated decisions of this court also have settled the question that the presiding justice was correct in refusing to instruct the jury that the paper title of the defendants was superior in point of law to that of the plaintiff. Although the patent under which the defendants claim is the elder, yet as the patentee took it subject to the confirmed title under which the plaintiff claims, this court has uniformly held, and now holds, that the latter, independently of any question of adverse possession, must prevail. *Bryan v. Forsyth*, (19 How. 334;) *Mehan et al. v. Forsyth*, (24 How. 175;) *Gregg v. Tesson*, (1 Black, 150.)

[\*569] \*4. Suit was commenced in this case on the 9th day of July, 1855, and the evidence shows that Charles Ballance, or those claiming under him, were in possession of the premises in controversy as early as 1842, and were also in possession when the suit was commenced. Ballance commenced building a dwelling-house on a part of the same quarter section in the year 1842, and in the early part of 1844 moved into it with his family, and since that time has continued to reside in that house. Some of the witnesses testify that he claimed to be the owner of this fractional quarter as early as 1832, and that he has cultivated part of it from that time to the date of the writ; but it will be sufficient to state that the evidence clearly shows that he has had his residence on the quarter section since the year 1844, and that he, or those claiming under him, have been in the possession of the lot in question in this case throughout the entire period of his residence in his present dwelling-house. Assuming the fact to be so, then, it is clear that the presiding justice erred in refusing to give the second instruction requested by the defendants, as well as in the instruction given upon that subject. No person who has any right of entry into any lands, tenements, or hereditaments, of which any person may be possessed by actual residence thereon, having a connected title in law or equity from the State or the United States, can make any entry therein under the limitation law of that State passed in 1835, except within seven years of the time of such possession being taken. Sess. Laws 1835, p. 42.



When the patent under which the defendants claim was issued, no survey of any lots granted to the inhabitants or settlers in the village of Peoria had been made. Those persons therefore held but an inchoate right, which must first be surveyed and designated before the right granted to them would supersede the title acquired under the defendant's patent. They might never make any claim, and in that event the other title would be valid. Consequently, this court held in *Bryan et al. v. Forsyth*, 19 How. 338, that, subject to that contingency, the patentee under whom the defendants claim took a title in fee till 1840, when the title to the village lots was by the survey and \*designation then made, [\* 570] ripened into a better title; but the court also held at the same time that the patent was a fee-simple title on its face, and as such was sufficient to afford protection to one claiming title under it, if accompanied by proof of such possession for seven years, as is required by the Illinois statute of limitation.

5. Reference is made by the plaintiff to the reservation contained in the patent, and the argument is, that the defendants held possession of the land subject to the rights of the plaintiff, and consequently that their possession was subservient and not adverse to the plaintiff's title. But the proposition cannot be sustained, as is obvious from the language of the patent. Fee-simple title is granted to the patentee and his heirs of the described tract, to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, subject, however, to the rights of any and all persons claiming under the before-mentioned act of congress. Looking at the language of the patent, it is clear that the saving clause was designed merely to exonerate the United States from any claim of the patentee or his assigns, in the event that any other person should prove a superior title. Such was the view taken of that clause by this court in *Mehan et al. v. Forsyth*, 24 How. 178, and in several other cases involving the same question, and we have no doubt that such is the construction of the clause. *Gregg v. Tesson*, 1 Black, 150. Applying these principles to the present case, the conclusion necessarily follows, that the presiding Justice erred both in refusing to instruct the jury as requested, and in the instruction given upon that subject. *Gregg et al. v. Forsyth*, 24 How. 174.

6. Where a quarter section, as in this case, has been subdivided by the occupant and claimant into lots, it is not necessary, under the Illinois statute, in order to secure the benefit of the limitation of seven years, that the claimant should have an actual residence on each lot of the subdivision in the sense in which those terms are ordinarily understood, but it is sufficient if he shows an actual res-

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idence for the entire period on some one of the lots, claim-  
 [ \* 571 ] ing the whole under the same title, and \*that the lot in  
 controversy was and is in the possession of his tenant under  
 his title, and pursuant to his claim. *Gregg v. Tesson*, 1 Black,  
 150; *Lindor v. Kidder*, 23 Ill. R. 51; *Williams v. Ballance et al.*  
 23 Ill. R. 197; *Gregg et al. v. Forsyth*, 24 How. 179. For these  
 reasons the judgment of the circuit court is reversed, and the cause  
 remanded, with instructions to issue a new venire.

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KELLOGG, Plaintiff in Error, v. FORSYTH.

REYNOLDS, Plaintiff in Error, v. FORSYTH.

2 Black, 571.

THESE cases involve precisely the same propositions decided in the  
 preceding case, and nothing else.

Writs of error to the circuit court for the northern district of Il-  
 linois. They were argued by the same counsel at the same term.

[ \* 571 ] \* Mr. Justice CLIFFORD delivered the opinion of the court.

These are writs of error to the circuit court of the United  
 States for the northern district of Illinois. Both suits were brought  
 in the court below by the present defendant against the respective  
 plaintiffs in error. They were actions of ejectment, and were re-  
 spectively commenced on the 18th day of November, 1854, to recover  
 possession of certain but different parts of claim numbered seven in  
 the village of Peoria, as confirmed to Thomas Forsyth under the  
 act of congress, approved the 3d day of March, 1823, en-

[ \* 572 ] titled \* "An act to confirm certain claims to lots in the vil-  
 lage of Peoria, in the State of Illinois." In each case the  
 defendants pleaded the general issue, and for the sake of brevity,  
 it may be well to say that the proceedings in the two suits are so  
 nearly alike that it will be unnecessary to refer to them separately,  
 except in a few particulars, which will be specially noticed. Par-  
 ties went to trial in both cases at the July term, 1856, and the ver-  
 dict in each, under the instructions of the court, was in favor of the  
 plaintiff, and the respective defendants excepted. Plaintiff claimed  
 title in each case under a patent to the legal representatives of  
 Thomas Forsyth, dated the 16th day of December, 1845, and it was  
 admitted at the trial that the plaintiff had that title. On the other  
 hand, the defendants in the respective suits claimed the premises  
 under a patent issued to John L. Bogardus, dated the 5th day of  
 January, 1838, and granting to him the southeast fractional quar-

ter of section nine, in township eight north, of range eight east, in the district of lands subject to sale at Quincy, in the State of Illinois, subject, however, to all the rights of any and all persons claiming under the act of congress of the 3d of March, 1823, entitled as already described. Premises in controversy are included in that patent, and it was admitted at the trial that the defendants in the respective suits have had the actual possession of the land for which they are sued by residences thereon for ten years next preceding the commencement of the suits. Other admissions, as to the possession of the premises by the defendants, were made at the same time, but it is not necessary to refer to them in this investigation. Defendants in the first case requested the court to instruct the jury that the title under which they claimed was a title deducible of record from the United States, and that the plaintiff, inasmuch as he admits that they had been in possession more than seven years before the suit was commenced, is barred by the Illinois statute of limitations; but the court refused the prayer, and among other things instructed the jury that the entry and patent under which defendants claimed were subject to the rights of any and all persons claiming under the act of congress of the 3d of March, 1823, so that no one claiming \*under the patent, and by [ \* 573 ] virtue thereof, could claim under the statute of limitations for seven years to have entered into the possession of the lot under the claim or color of title. Prayers for instruction substantially the same were also presented by the defendants in the other case, and the record shows that they were refused by the court, and that the instructions given to the jury were in all respects the same as those already recited.

1. It is insisted by the plaintiff, in the first place, that the bill of exceptions does not show that the rulings of the court in refusing to instruct the jury as requested, and in respect to the instructions given, were properly excepted to at the time the rulings were made. But sufficient appears to show that the prayers for instruction were presented, and the instructions given before the jury retired from the bar of the court, and the statement at the close of the bill of exceptions, and immediately following the instructions given is, that the "defendants then and there excepted" to the instructions, rulings, and decisions of the court. Evidently the objection is substantially the same as that considered in the case of *Dredge et al. v. Forsyth*, decided at the present term, and for the reasons there given it is overruled. *United States v. Brietling*, (20 How. 252.)

2. In the second place, it is insisted by the plaintiff that the possession of the defendants were not adverse to the title of the plain-

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Congdon v. Goodman.

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tiff. He states the proposition, but furnishes no explanation of the grounds on which it rests. Unless it is founded on the saving clause in the patent of the defendants, there is nothing in either case to give it the slightest support; and if it is founded upon that clause, it is a sufficient answer to it to say that it proceeds upon an erroneous view as to the legal effect of the patent. *Bryan et al. v. Forsyth*, (19 How. 338;) *Mahan et al. v. Forsyth*, (24 How. 175;) *Gregg v. Tesson*, (1 Black, 150.)

3. Suggestion is also made by the plaintiff that the title of the defendants is not such as is required by law to secure to them the benefit of the seven years' limitation act of the State of Illinois, but the point has been so frequently ruled otherwise by the State court, and by this court, that we do not think it necessary [ \* 574 ] \* to give it any further examination. Suffice it to say, that in our opinion the instructions requested should have been given, and those given should have been withheld. The respective judgments of the circuit court are accordingly reversed and the causes remanded, with instructions in each case to issue a new venire.

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CONGDON and others, Plaintiffs in Error, v. GOODMAN and others.

2 Black, 574.

JURISDICTION OVER STATE COURTS.

Where the plaintiffs in a writ of error to a State court claim adversely to an act of congress, and deny its validity, this court has no jurisdiction to revise the decision of the State court as to the validity of a sale of lands under the statutes of the State.

WRIT of error to the supreme court of the State of Tennessee. The case is stated in the opinion.

*Mr. Meigs*, for plaintiff.

No counsel for defendant.

Mr. Chief Justice TANEY delivered the opinion of the court. [ \* 575 ] This writ of error is directed to \* the supreme court of Tennessee, and is brought to revise a decree of that court which declared null and void a certain sale and lease of school lands in Polk county, under which sale and lease the plaintiffs in error claimed title to these lands.

The statement of the facts in the transcript will show that the validity of this sale and lease depended altogether upon the laws of

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the State, and the proceedings of the State authorities. The plaintiffs in error do not claim under any laws of congress, or any authority exercised by the United States. On the contrary, they deny the authority of congress to pass the act of 1843, (which is the only act of congress referred to,) and claim that a lease for ninety-nine years, made by the school commissioners under a law of the State, was valid, and passed the title for the term, although in direct opposition to the provisions of the act of congress. Such a controversy, where no right is claimed under the constitution or laws of the United States, is exclusively within the jurisdiction of the State court, and this court has no appellate power over its judgment. This writ must therefore be dismissed for want of jurisdiction.

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**RUSSELL, Plaintiff in Error, v. ELY and others.**

2 Black, 575.

**MORTGAGES—LEGAL TITLE—MORTGAGEE IN POSSESSION.**

1. Under the statutes of Wisconsin the legal title does not vest in the mortgagee upon condition broken, nor previously.
2. If the mortgagee procures possession of the land mortgaged by a collusive arrangement with the tenant of the mortgagor, and without the consent of the latter, his possession is not lawful, though the debt secured by the mortgage be due and unpaid.
3. It is not error for the court to say to the jury that, if they believe the testimony of a witness, certain results follow, though that witness be contradicted by others.
4. And when the bill of exceptions does not embody that witness's testimony, this court must suppose that there was in it sufficient to justify the court's statement of its effect.
5. The deposition of that witness, sent up to this court by the clerk and duly certified, cannot be received as part of the record, because it is not made part of the bill of exceptions, by reference or otherwise.

WRIT of error to the district court for the district of Wisconsin. The case is sufficiently stated in the opinion.

*Mr. Doolittle*, for plaintiff.

*Mr. Lynde*, for defendant.

\* Mr. Justice MILLER delivered the opinion of the court. [ \* 576 ]

This was an action of ejectment in the district court of the United States for the district of Wisconsin, in which the defendants in error obtained a judgment against the plaintiff in error, for the possession of block 70, of the school section of the city of Racine.

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The legal title to this block was in David L. Barton, on the 24th April, 1851, and on that day he made a mortgage deed conveying said block to Floyd P. Baker, to secure the payment of a note for \$1,400, due one year after date, and on the next day, the 24th of the same month, he conveyed it in fee to Clifford A. Baker.

The plaintiffs on the trial exhibited a regular chain of title from Clifford A. Baker to themselves, and the defendant proved himself to be the owner and holder of the note and mortgage above recited, and being in possession of the block sued for, claimed the right to hold it until the debt was paid. It appears further by the bill of exceptions, that plaintiffs traced their title through one [ \* 577 ] Charles R. Dean, and testimony was given tending \*to show that Charles R. Dean was a fictitious person, who never had any real existence. The only other fact shown by the bill of exceptions, necessary to an understanding of the case, is the statement of Thomas S. Baker, that from the summer of 1853, until the spring of 1856, he held possession of the property under a lease from plaintiffs, and then surrendered it to the defendant, without the knowledge or consent of plaintiffs.

The defendant on the trial excepted to the three propositions following, contained in the charge of the court to the jury:

1. "If the defendant procured the possession and occupies it in pursuance of an arrangement, in the spring of 1856, with T. S. Baker, without the consent of the mortgagor, or of these plaintiffs, then he is not lawfully in possession."

2. "If the testimony of Clifford A. Baker is believed, the deed" (to Charles R. Dean) "passed the title from him."

3. "The legal title, in the opinion of the court, on the fact of the deeds, is in the plaintiffs."

In examining the questions arising on these exceptions, it will be convenient to take up first, the one last mentioned. It is the province of the court in trials by jury to construe instruments of writing and determine their legal effect, and if it was apparent that on the face of the deeds the legal title was in plaintiffs, it was not only the right of the court, but its duty to so instruct the jury. Is it true, then, that the deeds read in evidence showed the title in plaintiffs?

The plaintiff in error maintains, that by the mortgage deed of D. L. Barton, of July 23d, 1851, the legal title passed to Floyd P. Baker, and that by the deed made July 24th, to Clifford A. Baker, nothing passed but the equity of redemption; and if he is correct in this, the instruction was error.

Numerous authorities from English and American decisions are,

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cited by counsel on both sides in reference to this point, but in the view which we take of the matter they become of little value, except those of the Wisconsin court. These deeds were both made in Wisconsin, in reference to land lying in that State, and in their construction must be governed by its laws. The Revised Statutes of Wisconsin, chap. 141, sec. 28, enact, \* that "no [\* 578] action of ejectment shall hereafter be brought by a mortgagee or his assigns, or representatives, for the recovery of the possession of the mortgage premises, until the equity of redemption shall have expired." Chap. 154, sec. 11, provides, that "in every case the mortgagor may retain full possession in trust for the mortgagee or purchaser of all premises mortgaged by him, *until the title shall absolutely vest* in the purchaser of such mortgaged premises, according to the provisions of this chapter."

The supreme court of Wisconsin, in the case of Wood and Moon v. Trask, (7 Wis. R. 512,) speaking of these provisions, and perhaps others in *pari materia*, says: "Our statute has essentially changed the rule of the common law, in relation to the position of the fee of the mortgaged premises, after condition broken. The fee does not vest, upon default of the mortgagor, in the mortgagee or his assignee. The fee only vests upon sale and foreclosure." In Tallman v. Ely, (6 Wis. R. 257,) the same court says: "Our statute provides that the mortgagee shall not bring his action of ejectment before foreclosing the equity of redemption, (sec. 53, chap. 106;) or, in other words, he must complete his title, before he shall be permitted to recover at law upon the strength of it."

These expositions of the statutes of Wisconsin are to be followed by the federal courts as rules of construction, and from them it results that the legal title did not pass to Floyd P. Baker by the mortgage deed of July 23d, but did pass to Clifford A. Baker by the deed in fee made the day after.

The instruction was therefore correct.

The next error alleged is based upon that part of the court's charge embraced in the following sentence: "If the defendant procured the possession, and occupies it in pursuance of an arrangement in the spring of 1856, with T. S. Baker, without the consent of the mortgagor or of these plaintiffs, then he is not lawfully in possession." The truth of this proposition would seem to be a necessary corollary from the one just discussed. Indeed it would seem to be a clearer deduction from the statutes cited than that made by the supreme court of Wisconsin, in \*reference to [\* 579] the position of the fee; for if the mortgagee has no right to recover the possession by legal proceedings, it would seem that

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he should not be permitted in any other manner to obtain that possession against the consent of the mortgagee, or the person holding under him. We are, however, referred by counsel for plaintiff in error to the cases of *Gillett v. Eaton*, (6 Wis. R. 30,) and *Tallman v. Ely*, (Wis. 257,) as establishing a contrary doctrine. A careful examination of these cases does not sustain the proposition in favor of which they are cited, to an extent which will conflict with the instruction of the court under consideration.

It is true, that in both of these cases it is held that the mortgagee *lawfully in possession* cannot be turned out by ejectment brought by the mortgagor. In both the cases, the decision turned upon the fact that the mortgagees *were* lawfully in possession, and in both it is evident that the defendants originally entered with the consent of the mortgagor, either express or implied.

The language used in the second of the cases cited, namely, *Tallman v. Ely*, a part of which has already been quoted, in regard to the position of the fee, shows very clearly the distinction which was in the mind of the court as to the *lawfulness* of the mortgagee's possession. The court says: "Our statute provides that the mortgagee shall not bring his action of ejectment before foreclosing the equity of redemption, sec. 53, chap. 106, or in other words, he must complete his title before he shall be permitted to recover at law upon the strength of it. Still, if he *is lawfully* in possession after condition broken, he will not be turned out until his debt is paid."

This leaves still undecided the question as to what is lawful possession, and we concur with the district court, that if the defendant in this case, although he may have been the holder of the mortgage and the debt secured by it, obtained the possession of the block in controversy by an arrangement with the tenant of the plaintiffs, after said lease had expired, and without their consent, he was not lawfully in possession.

The remaining exception is to the charge of the court, [ \* 580 ] "that \*if the testimony of Clifford A. Baker is believed, the deed" (to Charles R. Dean) "passed the title from him" (Baker.) In that part of the charge which immediately precedes the words objected to, the court says: "The deed of Clifford A. Baker to Charles R. Dean is alleged to be fraudulently executed by Floyd P. Baker in the name of Clifford A. Baker. That he used Clifford's name without authority, and that Charles R. Dean was a fictitious person. The evidence of Botsford shows these facts *prima facie*."

It is manifest that if Charles R. Dean was a fictitious person,



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plaintiffs had no title, for they claimed under a deed from him. It is equally clear, that if the testimony of Botsford showed that fact *prima facie*, the testimony of any witness who proved the existence of Dean as a real person was very important, and required careful scrutiny; and the comments of the judge on any such witness, or his evidence, should have been given with great caution, and should have left to the jury all that properly belonged to it. But we are unable to see from anything in this record that the court exceeded its functions in the charge. It was certainly proper that it should call attention to Baker's testimony, as it had done to that of Botsford. Baker may have testified to facts, which if true, or if believed by the jury, made it so clear that the title passed from him to Dean, as to justify the court in saying so. And if he did so testify, we cannot say that the conclusion thus stated by the court, leaving as it did the right to believe or disbelieve the witness to the jury, was error.

It is true that this court does not see anything in that part of Baker's testimony embodied in the bill of exceptions which justifies such an inference. But the bill of exceptions does not purport to give all that he said, and, according to a well-known rule, this court, under such a condition of the record, is bound to presume that there was that in Baker's testimony which justified the instruction. What purports to be the entire deposition of Baker is sent up by the clerk of the district court, and is printed in the record before us, and if properly before us might sustain the exception. But this deposition is not incorporated into the bill of exceptions, nor so referred to in it as to be made \*a part [ \* 581 ] of the record of the case. It is only a useless incumbrance of the transcript, and an expense to the litigating parties. Clerks who certify transcripts to this court should know what does properly constitute the record they are to send up, as it is a matter which has been often decided, and which may be readily learned with a little attention.

The judgment of the district court is therefore affirmed.

## THE SHIP POTOMAC.

SIMPSON, Appellant, v. BAKER.

2 Black, 581.

## ADMIRALTY—PRACTICE IN SUPREME COURT.

1. This court reaffirms the doctrine of the steamer *St. Lawrence*. 1 Black, 525; (4 Miller 585.)
2. Where the question is as to the accounting for supplies, and the report of the master merely found the amount due, without stating an account, this court will not reverse such a finding. The appellant should have had a new reference to the master, with directions to state an account, and to report evidence, to which, if he objected, he could file exceptions.
3. That libelant had some one included with him in the furnishing of supplies is no ground for reversing the decree in his favor.

APPEAL from the circuit court for the district of Maryland. The case is stated in the opinion.

*Mr Gillet*, for appellant.

*Mr. Benedict*, for appellees.

[ \*583 ] \*Mr. Justice GRIER delivered the opinion of the court.

When the counsel prepared their briefs of argument in this case, they could not have seen the report of the case of “the steamer *St. Lawrence*,” (1 Black, 525,) or they would have considered it labor lost to argue the same question of jurisdiction on the very same facts again at this term. The opinion of the court in that case was unanimous; the question was fully discussed, and the opinion delivered by the Chief Justice, and needs no further remark.

The appellant, in his answer, admits that the repairs were made to his ship by the libelant, but takes issue on the amount, and alleges an agreement that the repairs to be made should not exceed a certain sum, less by one-half than the bill finally presented.

But it appeared clearly from the evidence, that although the libelant made an estimate of what would be the probable cost of the repairs, he did not contract to do the work for any given sum. The contract was to supply the timber and materials at market prices, and to receive certain wages per diem for each person employed. When the vessel was stripped, it was found necessary to make repairs on a much larger scale than had been at first estimated. The amount of libelant’s bill of course far exceeded his original estimate. The report of the master found the amount due, but stated no account. The exceptions to it were—1st. “That it was for an amount far exceeding any amount of work performed.” 2d. “That

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the libelant had not proved any work performed for which he was entitled to a decree." 3d. "That the libelant was not, under the pleadings, entitled to any decree whatever in his favor." 4th. "That commissioner erred in admitting evidence," &c.

\*If the respondent wished to contest any of the specific [\*584] charges of the account, he should have had the report referred back to the master, with direction to state an account. The account returned by the master should report the items objected to and whether they were allowed, and the testimony or reasons justifying his decision. To such a report the party could make specific exceptions, and such general objections as those stated might well be treated as frivolous.

As the record stands this court cannot know what items of the libelant's account were allowed or disallowed, or excepted to; we cannot say that other credits should have been allowed, because we do not know whether they were allowed or not.

For anything that appears on the face of this record the judgment of the district and circuit courts are correct. The libelant proved his demand for work and materials furnished by the books and accounts kept by his clerks; and the court may well have considered this better evidence than the opinions of experts, taken *ex parte* to undervalue the work and count the treenails, after the sheeting was replaced and the repairs covered with paint. It is not enough for the appellant merely to raise a doubt on conflicting testimony, that the judgment of the court below may possibly be erroneous. But in this case he has not succeeded even in raising a doubt.

The judgment of the court below is assumed to be correct till the contrary is made to appear. It is not sufficient to produce a record from which it does not appear whether it is right or wrong.

The objection that the libelant should have joined some unknown partner as a party to this libel has no foundation whatever.

The contract is proved to have been made and the work executed by the libelant. There is no evidence that he had a partner in any way interested in the profits of the contract; and if he had, it was not necessary to make him a party, as appeared by the case of *Law v. Cross*, decided at last term. (See 1 Black, 533.)

Let the judgment of the circuit court be affirmed.

Randall v. Howard.

JOHN RANDALL, jr., *et al.*, Appellant, v. HOWARD.

2 Black, 585.

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## EFFECT OF JUDGMENTS OF STATE COURTS WHEN SOUGHT TO BE ANNULLED IN A FEDERAL COURT.

1. Where a defendant in a mortgage foreclosure suit agreed with the plaintiff to have a sale earlier than the original decree allowed, for the purpose of defeating other mortgage creditors on part of the land in collecting their debts, a court of equity will not enforce, against the plaintiff and purchaser under such a sale, that part of the agreement by which the mortgagee could hold the land on payment of his debt, notwithstanding the sale.
2. Such an agreement is a fraud on third persons which a court of equity will not enforce in favor of either party.
3. The circuit court of the United States, sitting in equity, has not jurisdiction to set aside a sale and deed made by order of a State court in a prior suit between the same parties. The remedy, if injustice has been done, is by petition to the State court.

APPEAL from the circuit court for the district of Maryland.

*Mr. Mayer*, for appellants.*Mr. Evans* and *Mr. Gale*, for appellees.

[ \*586 ] \* Mr. Justice DAVIS delivered the opinion of the court.

This is a bill in equity filed in the circuit court of the United States for the district of Maryland by the appellants against the appellee, who interposed a demurrer, which was sustained by the court below, and an appeal was taken to this court.

The bill states substantially that the complainant, John Randall, jr., was on the 6th of April, 1854, largely indebted to the defendant, to secure which indebtedness both of the complainants executed a mortgage on lands in Cecil county, Maryland, which lands were held in trust for the complainant Letitia's benefit for life. That soon after the mortgage matured the defendant filed his bill in the Cecil county circuit court for foreclosure and sale; and, on answer filed, a decree was passed on the 15th of October, 1855, for the sale of the mortgaged lands, time being given until 9th of October, 1856, to bring the money into court. That in April, 1856, in order to defeat an attempt (charged to be fraudulent) by other parties to obtain possession of part of the lands mortgaged, it was agreed that the defendant with the assent of the complainants should petition the court for an immediate sale, which was done, and the time for sale changed, and a friendly arrangement was made with the defendant that he was to buy the property ostensibly for himself, but was really to hold it in security for the decreed indebted-

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 Randall v. Howard.
 

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ness, upon the satisfaction of which the purchase was to enure to the benefit of the complainant Letitia. That the sale took place on 14th October, 1856, and the defendant was the purchaser, (the "friendly arrangement" continuing,) and that the property sold for less than its value on account of the general understanding that the sale was merely a formal one and not meant to divest the estate of the complainants. That the sale was ratified \*without objection from the complainants, under the as- [ \* 587 ] surance from the defendant that the property should, notwithstanding the ratification, stand as a security for the amount decreed, which was to be paid by installments. That to perfect the form of sale, and to make it conform to the ostensible title of the purchaser, the complainants rented the property of the defendant. That having obtained an apparent title, the defendant has fraudulently determined to act as if he was the real owner, and is claiming the right to sell, and that through threats he extorted an agreement from the complainants, which was framed and meant to involve them in the recognition of his title. That the defendant, in furtherance of his object to oppress, has, by legal though irregular process, through the sheriff of Cecil county, dispossessed the complainants.

The prayer of the bill is to restrain the defendant from disposing of the lands, and for the sale of so much of said lands as may be necessary to pay off the defendant according to the understanding prior to the purchase, and that the residue of the lands be conveyed to Mrs. Randall. There is also a prayer for general relief.

There are two questions presented by this record :

1. Upon the facts stated in this bill, are the complainants entitled in equity to the relief prayed for ?
2. Has this court jurisdiction ?

The statements of this bill are vague and uncertain, frequently argumentative, and very rarely plain and direct. The whole bill lacks definitiveness. Agreements, friendly arrangements, understandings, and fraudulent devices are freely spoken of, but the character of the agreements and the nature of the devices we do not learn. The bill seeks to establish a trust for the benefit of Mrs. Randall, growing out of certain proceedings in the circuit court of Cecil county, Maryland. Are the complainants in a situation to enforce the trust, if one is established ? We think not.

The following allegations contain the charges relied on in the bill to establish the trust :

"And your orator and oratrix state and charge, that about \*April, in the year 1856, in consequence of a fraud [ \* 588 ]

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being attempted against your complainants, through devices involving the possession of part of the land mortgaged as aforesaid, it was deemed proper for counteracting said fraud, that, on a petition to be filed by said Howard in the case of said decree, your complainants should assent to a sale, (under friendly arrangements between said Howard, and then rendering such sale merely formal and nominal,) taking place forthwith, instead of being deferred to the period (the next October) provided by the decree.

"And your complainants aver, that under their answer to such petition, which was filed, the time for the sale was by decree thus changed, and under the friendly arrangement and understanding aforesaid, and which was to the effect that said Howard was to become purchaser of said mortgaged property at a sale under the decree, but really to only hold it for securing the payment of the mortgage and decreed indebtedment as aforesaid, upon satisfying which the property it was understood should enure, as provided by the terms of the said trust, for the benefit of your oratrix."

These allegations, stripped of their indefiniteness and vagueness, mean simply this, that the parties to this bill, in order to counteract a claim set up by other parties for a portion of the mortgage lands, combined together, through the aid of the court, to shorten the time of sale, and to cover up the real ownership of the property.

A fraudulent agreement was entered into to defeat, as is charged, "a fraud attempted against the complainants." If the claim set up was a fraud on the rights of the complainants, does that consideration change the character of the agreement which was made to defeat that fraud? Manifestly not. The whole complaint of the bill is that the defendant will not execute the agreement thus fraudulently made, and the object of the bill is to compel him to do it.

A court of equity will not intervene to give relief to either party from the consequences of such an agreement. The maxim "*in pari delicto potior est conditio defendentis*" must prevail.

It is against the policy of the law to enable either party, [ \* 589 ] in controversies between themselves, to enforce an agreement in fraud of the law, or which was made to injure another. + Story's Equity, vol. 1, sec. 298; Balt. v. Rogers, (2 Paige, 156;) Wilson v. Watts, (9 Gill, 356.)

There are several other grounds decisive against the relief prayed for. We will, however, notice but one other. There is no averment in the bill that the defendant ever agreed in writing to hold the lands in trust for Mrs. Randall. In fact it is manifest from the whole bill that the agreement was a mere matter of conversation between the parties, and that no memorandum in writing was ever

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Randall v. Howard.

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made. Inasmuch as it concerns an interest in lands, and is in parol, it is void by the statute of frauds, and appearing as it does on the face of the bill, the defense of the statute of frauds may be taken advantage of on demurrer. *Walker et al. v. Locke et al.*, (7 Cushing, 90.)

2. Has this court jurisdiction? A conflict of jurisdiction is always to be avoided. Mr. Justice Grier, in *Peck v. Jenness*, (7 Howard, 624,) says: "That it is a doctrine of law too long established to require a citation of authorities, that where a court has jurisdiction it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding on every other court.

"These rules have their foundation not merely in comity, but on necessity. For if one may enjoin the other may retort by injunction, and thus the parties be without remedy, being liable to a process for contempt in one if they dare to proceed in the other."

The bill in this case brings in review various matters passed on in the progress of a suit by the Cecil county circuit court, a court of general jurisdiction having complete control of the parties and of the subject matter of controversy.

It seeks to annul a sale of lands made by virtue of a decree of the Cecil court, sitting as a court of equity in a cause depending between these same parties; to affect the distribution of the proceeds of the sale; to enjoin the defendant from making any disposition of the lands purchased by him; to disturb his \*pos- [ \* 590 ] session; to invalidate his title, and to have the mortgaged property resold.

This is a direct and positive interference with the rightful authority of the State court.

If there was error in the proceedings of the court, a review can be had in the appellate tribunals of the State. If, as is charged, the decree is sought to be perverted and made the medium of consummating a wrong, then the court on petition or supplemental bill, can prevent it. If, as appears by the proceedings, the surplus money arising from the sale is still undisposed of, then the whole case is under the control of the court, and no supplemental bill even is needed to prevent the wrong.

The decree dismissing the bill is affirmed.

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Nebraska City v. Campbell.

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## NEBRASKA CITY, Plaintiff in Error, v. CAMPBELL.

2 Black, 590.

## MUNICIPAL CORPORATIONS—NEGLIGENCE.

1. The law is well settled that municipal corporations, upon which the duty is imposed to construct and keep in repair streets, bridges, &c., and upon which are conferred the means of accomplishing this duty, are liable for any special damages growing out of a neglect of this duty. 1 Black, 39, (4 Miller, 349.)
2. Evidence that plaintiff, who had suffered the injury, was a physician in large practice, and that it occurred at a period of the prevalence of much sickness, is admissible on the question of damages.

WRIT of error to the supreme court of the territory of Nebraska.

*Mr. Taylor*, for plaintiff.

*Mr. Woolworth*, for defendant.

[ \* 591 ] \* Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the supreme court of the territory of Nebraska.

The suit was brought in the court below by Campbell against the city to recover damages for injuries received by reason of a defective bridge in one of the streets in the city.

The charter vested in the city council the title to all the streets within the corporate limits, and it is made their duty to construct and improve the same at the public's expense; for this purpose, and others, the council are authorized to levy a tax on all the taxable property within the city. This provision in respect to streets necessarily embraces all bridges within the limits of the city and constituting a part of the street.

[ \* 592 ] \* There is also a general act referred to, which, among other things, confers upon all incorporated cities exclusive jurisdiction over all streets, roads, bridges, and ferries within their corporate limits, and exempting the inhabitants from any assessment for road tax except by the corporate authorities of the same.

The law is well settled in respect to public municipal corporations, upon which the duty is imposed to construct and repair, or to keep in repair streets or bridges, and upon which is also conferred the means of accomplishing such duty, that they are liable for any special damage arising out of neglect in keeping the same in proper condition.

The principle was very fully considered at the last term in the case of *Weightman v. The Corporation of Washington*, where all



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the authorities will be found collected and examined. 1 Black, pp. 39, 51, 52, 53.

The plaintiff was a practising physician, and in the course of the trial evidence was given, after objection, that he was engaged in extensive practice at the time of the injury, and also that it was a period of great sickness in the community.

The declaration states that the plaintiff was a physician at the time of the injury, and after describing the nature and extent of it, adds that by reason thereof, he was greatly bruised, sick, and lame, and so continued for a long space of time, to wit, for the space of six weeks, and during all that time suffered great pain, and was prevented from transacting his ordinary business as a physician during that time.

Now, the evidence in question was relevant and pertinent, with a view to show the extent and amount of the ordinary business of the plaintiff in his profession, of which it is averred he was deprived during the time of his disability, and laid a foundation which enabled the jury with some degree of certainty to ascertain the direct and necessary damages sustained from the injuries.

In the case of *Wade v. Leroy et al.*, (20 How. 34, 43, 44,) which was an action for injuries to the plaintiff for carelessly navigating a ferry boat, the court held that proof of the ordinary \*business in which the plaintiff was engaged, [\* 593] and that he was largely engaged in it, was admissible and pertinent upon the question of damages, though the fact was not set out in the declaration. The proof was regarded as showing the direct and necessary loss or damage from the injuries sustained.

The case before us is broken into many points, and prayers to the court for instructions to the jury, but those noticed above cover all that is material to dispose of it.

Judgment of the court below affirmed.

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THE UNITED STATES, Appellant, v. PEDRO CHABOYA.

PEDRO CHABOYA, Appellant, v. THE UNITED STATES.

2 Black, 593.

CALIFORNIA LAND GRANTS.

Where claimant shows no grant, and relies on nothing but long-continued possession, this will not avail when it is shown to be merely a permissive possession by payment of rent of the common lands of the pueblo, however long it may have been continued.

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The United States v. Chaboya.

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CROSS-APPEALS from the district court for the northern district of California.

*Mr. Wills*, for the United States.

*Mr. Hepburn* and *Mr. Wilkins*, for Chaboya.

Mr. Justice MILLER delivered the opinion of the court.

These are appeals from the district court of the United States for the northern district of California.

The appellant, Pedro Chaboya, on the 2d day of March, 1853, filed with the board of commissioners to settle private land claims in the State of California his petition to have confirmed to him two leagues of land in the county of Santa Clara, bounded as follows : On the north by the lands of José de Jesus Vallejo ; on the east by the rancho of Antonio Suñol and the road from San José [ \* 594 ] to the valley ; on the south by the Canada \* del Aliso, (Colindante con,) Don Flagencia Higuera, and on the west by the estuary.

With the petition were filed certain papers showing an application by Chaboya, in 1844, to Governor Micheltorena, for this land, and a reference by the governor to the prefect for the necessary information under the colonization laws and the sub-prefect's report.

There was also filed, as an exhibit, an incomplete espediente relating to a totally different tract of land, all the parts of which bear date in the year 1839.

The commissioners rejected the claim, saying that no grant had ever issued, no proof was given of segregation of the land, none of possession, and none of cultivation. The case, however, was carried into the district court by appeal, and the appellant filed his petition in that court, in which, referring to his former petition before the board of commissioners for a more particular description of the land, he prays that their decree may be reversed and his title confirmed.

In the progress of the case in the district court, it was discovered that the land on which the claimant lived, and to which alone he really set up any claim, was not described in the petition, but was that mentioned in the second espediente above alluded to, and was twenty miles distant from the land for which confirmation was asked. Under these circumstances the claimant was permitted by the court, on 15th of June, 1857, to file an amended petition, setting out these facts and a true description of the land claimed, which was called La Posa de San Juan Bautista.

After a large amount of testimony had been taken in reference

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The United States v. Chaboya.

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to this last-mentioned claim, and the case had come to a hearing, the court held that it had never been presented to the board of commissioners, and that the district court had no jurisdiction as to that piece of land, and that it was then too late, under the act of 1851, to present the claim anywhere.

From this decree Chaboya appealed to this court, and the record of the case, up to this stage of the proceedings, constitutes case No. 131 of our docket for the present term.

\*But while this appeal was pending, the appellant pro- [\* 595] cured the passage of an act of congress, approved April 25, 1862, which authorized the district court to hear and determine his claim to La Posa San Juan Bautista, in the same manner, and with the same jurisdiction, as if it had been duly presented to the board of land commissioners. Accordingly, after taking further testimony, the case again came to a hearing before that court on the 6th of November, 1862, and a decree was rendered rejecting the claim to all of the tract of land, supposed to be about two square leagues, except five hundred acres of it, which had been allotted to him by the authorities of San José and confirming to him that much of it.

From this decree he has also appealed to this court, and the record which has been brought up, being a complete transcript of the case from its commencement, constitutes case No. 288 of the docket of this term.

The appellant does not in this court claim that he has any right to the land described in his petition to the board of commissioners, as to which they decided against him; but he does insist that the last decree of the court deprives him of a very valuable tract of land, to which he thinks himself entitled.

The main fact on which he rests his claim in this case is his long-continued possession of the land. There is no pretense that there was ever any grant of the land by the Mexican government, and if the claim is to be confirmed, it must be upon the equity growing out of that possession, and the circumstances connected with it. It is established by the testimony in the record that Chaboya was residing in a house of very insignificant proportions, on some part of the tract, as early as the year 1837, and has continued so to reside to the present time. But it also appears that his right to reside there, and especially his right to any exclusive possession or use of tract known as La Posa de San Juan Bautista, was matter of controversy from that early time between himself and the residents of the pueblo of San Jose. These villagers claimed that the tract so named was a part of the ejidos or common lands of the pueblo, on which the cattle of all the pob'adores or villagers had

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The United States v. Chaboya.

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[ \* 596 ] a right to range, \*and was particularly necessary to them on account of the water which it afforded. In his petition to the governor asking a grant of this land, Chaboya alludes to his possession and to the resistance made to it by the residents of the pueblo, in these words:

“Therefore, I pray you to be pleased to grant me the ownership of what I actually possess, with my house and cattle, with the permission of the prefecture of this district, showing your excellency that the reclamations which the residents of the pueblo have addressed against me to that government are absolutely destitute of justice, since it is only made by four or five bad entertaining citizens, carrying of the view of the pueblo, since in nowise I prejudice their interests, and it happening to be vacant land, conformable to the law of colonization.”

This petition was dated May, 10, 1839, and the governor having regard to this same matter of disputed possession, made the following order, which was endorsed on the margin of the petition :

“MONTEREY, *May 20th*, 1839.

“Let the prefecture report on the present solicitation, arranging from hence that the interested party may be conserved in the possession in which he finds himself of the land solicited, as long as the suitable procedure is going on.

(Signed) “ALVARADO.”

On the 25th May the prefect reported as follows:

“SIR: The petitioner ought to be excused from the usual procedure, since the prefecture in my charge has already taken and perhaps despatched it conformable to his solicitation, since the reclamation which the residents of the pueblo of the vicinity have made, and of which I verbally have informed you, have no other design than to remove Sir Chabolla from the place he has occupied for many years, on account of antipathy of previous arrangement, which absolutely are destitute of justice.

“Notwithstanding, your excellency will act in the premises as you shall believe convenient.

“San Juan de Castro, 25th of May, 1839.

“JOSÉ CASTRO.”

[ \* 597 ] \*The foregoing papers were filed with the petition of claimant before the board of commissioners, and were all the documentary evidence so filed by him in relation to this tract of land. But in the progress of the case in the district court, another paper was produced, and as it relates to this same matter of the possession, and seems to have a close connection with those just mentioned, it may as well be inserted here. It is as follows:

"The citizen, Dolores Pacheco, justice of the peace of the pueblo of San Jose Gaudalupe de Alvarado.

"By superior order of the señor prefect of the first district, it is conceded to the citizen Pedro Chabolla that he inhabit the place named Posa de San Juan Bautista without building any house of foundation, and much less plant trees (plantar bienes raises) for the term of two years, subjecting himself to pay \$6 annually, and he must assist in the work on bridge or any others by which he may be benefited.

"San José Gaudalupe de Alvarado, February 29th, 1840.

"DOLORES PACHECO,

"PEDRO CHABOLLA."

Notwithstanding the report of the prefect Castro, that the claimant ought to be excused from the usual procedure, by which we suppose he meant the procuring of an informe, that the land was vacant, the governor did not issue a grant.

His claim or right to the possession stood then in the same condition of dispute as between himself and the pobladores of San José that it had previously, when on the 29th of February, 1840, he entered into what may be termed a compromise with them, which is evidenced by the foregoing paper, signed by himself and the justice of the peace of that pueblo.

We can give to this paper no other construction than a renunciation by Chaboya of any *right* to the possession of La Posa de San Juan Bautista, and a consent to occupy it for two years under the authorities of the pueblo, paying them \$6 annual rent, and submitting to the terms which they chose to impose, to prevent him from acquiring any permanent possession or interest in the land.

There is nothing in the subsequent history of his occupation \*of the place to change the character of his possession. [ \* 598 ] It is proven that while his cattle ranged over it, those of the residents of the village generally did the same.

On the contrary, there *is* strong evidence that this was his own construction of the character of his possession.

After the country came under the American government, the authorities of San José determined to divide the ejidos or common lands of the pueblo, including this tract, among its residents, and in doing so allotted to Chaboya, as his share, five hundred acres around his dwelling. He accepted the instrument in the nature of a deed made to him by the alcalde, and had it recorded. He was shortly after taxed by the authorities of San José for the entire tract of La Posa de San Juan Bautista, and it is distinctly proved by two witnesses that he appeared before the proper officers to have

Leffingwell v. Warren.

the tax remitted, stating that he only claimed the five hundred acres allotted to him in the partition. The tax was accordingly remitted.

We think these facts show very clearly that the appellant never had any legal title to the land in question; that he never had any exclusive possession, beyond the five hundred acres which was allotted to him by the authorities of San José, and confirmed by the decree of the district court; and that such possession as he did have was subsidiary to the claim of the authorities of the pueblo, and with recognition of their rights, and that the decree should be affirmed.

The decree of the district court is affirmed in both appeals.

LEFFINGWELL, Plaintiff in Error, v. WARREN.

2 Black, 599.

STATE STATUTES AS CONSTRUED BY STATE COURTS BINDING ON FEDERAL COURTS.

1. The federal courts adopt the decisions of the State courts in construing State statutes as the law of such cases; and where these courts have varied, this court accepts the latest decision of the highest court of the State as a sound one.
2. The supreme court of Wisconsin having decided that a tax deed, however defective, is, when recorded, color of title, so as to sustain the limitations of three years' possession under it as a bar to any action by the true owner, this court is bound by that decision.
3. It is therefore immaterial, in such case, that the tax deed is void on its face if it shows a sale and the tax was unpaid.

WRIT of error to the district court for the district of Wisconsin. The case is well stated in the opinion.

*Mr. Lynde*, for plaintiff.

*Mr. Doolittle*, for defendant.

Mr. Justice SWAYNE delivered the opinion of the court.

This cause is brought here by a writ of error to the district court of the United States for the district of Wisconsin.

[ \* 600 ] \*In the court below, Warren, the defendant in error, instituted an action of ejectment to recover the premises in controversy. Judgment was rendered in his favor. The defendant there is the plaintiff in error here.

The parties made an agreement as to the facts which are set forth in the bill of exceptions. It was thereby admitted upon the trial—

“That the plaintiff has a perfect chain of title to the land in

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L-ed 261  
37f 304  
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36f 334

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question from the United States to himself; and that the defendant was in possession thereof at the time of the commencement of this suit; and that the land in suit is of the value of more than \$2,000;

“That the county of Rock, on the 6th day of February, A. D. 1852, made and delivered to John M. Keep a paper purporting to be a tax deed of said premises, of which, and the certificate of acknowledgment, the following is a copy.”

(Here follow the copies mentioned, which it is unnecessary to insert.)

(“The plaintiff, however, not waiving any objection to said tax deed, which may appear on its face, or which may be made to appear by any other facts or evidence in the case.)

“That said deed was recorded in the office of the register of deeds for Rock county, where said land is situated, on February 6th, 1852, (subject to the objection, however, which is reserved by the plaintiff on the ground that said deed is not so executed and acknowledged as to be entitled to be recorded;) that immediately thereafter said Keep sold said premises to said defendant, and that said defendant immediately thereafter entered into possession of said premises, and has been in possession ever since.

“That the plaintiff, on the 29th day of February, 1848, that being the proper time to pay the taxes on said land, including the tax for the non-payment of which said tax deed purports to be given, wrote a letter and sent it by mail to the county treasurer of said Rock county, who was the officer authorized by law to demand and receive all the taxes on said land, including the delinquent tax in question, stating that he wished to pay \*the taxes [ \* 601 ] on a list of lands mentioned, including the land in suit, asking for a bill of the same, showing the amount that he might remit; that said treasurer on the same day received said letter at his office, and answered it, inclosing a bill corresponding with the receipt hereinafter given, stating that the inclosed was the bill called for by plaintiff's letter; that thereupon the said plaintiff remitted said amount to said treasurer, who received the same, and returned to said plaintiff the said receipt hereinafter set forth the same day; and that at the date of the receipt the treasurer and the plaintiff supposed that all the taxes on said lands were included in said receipt; but the parties agree that the particular tax for which the land was sold and deed given was not found by said treasurer, and not included in said receipt.

“That after the date of said payment and receipt no demand was made of said plaintiff for payment of said delinquent tax, nor had plaintiff actual notice that said tax remained unpaid until more

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than three years after the recording of the tax deed, but that the premises were duly advertised for sale as by law required, and that said deed was recorded as hereinbefore set forth. That the said delinquent tax and costs amounted at the date of the sale to \$19<sup>81</sup>/<sub>100</sub>. That on the 11th day of April, 1857, said plaintiff deposited with the clerk of the supervisors of Rock county the sum of \$70<sup>58</sup>/<sub>100</sub>, being the full amount of sale, interest, and costs, to redeem said land mentioned in the said tax deed, and that the deposit still remains there, there being no other unpaid tax on said land at that time.

"The following is a copy of the receipt given by said treasurer, mentioned above, viz:

"TERRITORY OF WISCONSIN, ROCK COUNTY,

"TREASURER'S OFFICE,

"February 29th, 1848.

"Received of the different owners, per Catlin & Williamson, agents, \$25<sup>60</sup>/<sub>100</sub> in full of the taxes charged for the year 1847, on the following tracts of land in the county of Rock, W. T., consisting of the following items of tax, to wit: county, town, common school, territorial revenue, and

[ * 602 ]											
DESCRIPTION.	Section.	Town.	Range.	Acres.	Value.	County.	Town.	Ter. Rev.	Schools.	Roads.	Total.
E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$ .....	34	1	11	80	160	54	165	42	.....	.....	\$2 62
S. E. $\frac{1}{4}$ .....	34	1	11	160	320	108	230	84	.....	.....	5 22
Lot No. 2. ....	11	4	12	32.56	97 <sup>33</sup> / <sub>100</sub>	19	49	29	.....	.....	97
N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ .....	3	4	11	40.44	170	34	32	20	29	.....	1 15
Lot No. 1.....	11	4	12	55	165 <sup>36</sup> / <sub>100</sub>	33	83	50	.....	.....	1 66
N. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ .....	1	4	10								
S. W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ .....	1	4	10	40	233	88	88	43	70	.....	2 87
Lot No. 3. ....	15	4	12	64.35	193 <sup>14</sup> / <sub>100</sub>	39	96	58	677	.....	8 70
E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$ .....	14	4	11	80	112	69	68	43	62	.....	2 42
											\$25 60

"WM. A. LAWRENCE, *Treasurer*.

"The first two tracts being the land in question."

It appears further by the bill of exceptions that instructions to the jury were asked by the plaintiff in error, which were refused by the court, to which refusal he excepted; and that instructions were given to which he also excepted.

In the view which we have taken of the case, it is necessary to advert to those instructions only which relate to the statute of limitations.

They are as follows:

"The counsel for the said defendant did request the said judge to charge the jury as follows:



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 Leffingwell v. Warren.
 

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"1. That it being admitted by the parties that the defendant entered into possession of the land in question under a tax deed, and has held said possession under said deed more than three years before the commencement of this action, and it being also admitted that said tax for which said land was sold was never paid, they will find for the defendant.

"And the said judge refused to give said instruction, and to which refusal the said defendant, by his said counsel, did then and there, and in the presence of the said jury, duly except.

"And the said judge did also then and there further declare and deliver his opinion to the said jury, that the deed is void on its face, as it recites that the several tracts therein described were sold collectively for a gross sum; and the deed being void, \*neither it, nor the subsequent possession by the defend- [\* 603] ant under it for three years after the recording thereof, is a bar to the plaintiff's recovery.

"To which said last-mentioned opinion and charge of the said judge the said counsel for the said defendant did then and there, and in the presence of the said jury, on behalf of the said defendant, duly except."

The statute of limitations relied upon by the plaintiff in error provides that—

"Any suit or proceedings for the recovery of lands sold for taxes, *except in cases where the taxes have been paid or the lands redeemed as provided by law*, shall be commenced within three years from the time of recording the tax deed of sale, and not thereafter. Revised Statutes of Wisconsin of 1849, chap. 15, sec. 123, p. 164.

The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several States, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the 34th section of the judicial act of 1789.

The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. *Shelby v. Guy*, (11 Wheat. 351;) *McCluny v. Silliman*, (3 Pet. 270;) *Greene v. Neil's Lessee*, (6 Pet. 291;) *Ross v. Duval*, (13 Pet. 45;) *Massingall v. Downs*, (1 How. 767;) *Nesmith v. Sheldon*, (1 How. 812;) *Van Rensselaer v. Kearney*, (11 How. 297;) *Webster v. Cooper*, (14 How. 504.)

If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the latest settled adjudications. (Uni-

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ted States v. Morrison, (4 Pet. ;) Green v. McNeil's Lessee, (6 Pet. 291.)

This statute of limitations came under the consideration of the supreme court of Wisconsin, in *Edgerton v. Byrd*, (6 Wisconsin

Rep. 597.) The court held: "A tax deed informal and [ \* 604 ] defective \* in substance is admissible to show color of title in the defendant to bring him within the statutes of limitation."

"Suits for the recovery of lands sold for taxes, except in cases where the taxes have been paid, or the lands redeemed according to law, must be commenced within three years from the time of recording the tax deed of sale, or no recovery can be had."

"Possession accompanied with a claim of title under a tax deed void for informality is adverse possession."

In *Sprecker v. Wakeley et al.*, (11 Wis. R. 432,) the subject came again under consideration. The court reaffirmed the principles of the former decision.

In answer to the objection, that it should be shown the land had been regularly sold, and that the officer who executed the deed had authority to give it, they say :

"But if this is a correct view of the statute, we fail to perceive any object in passing it. For when the public authorities have proceeded strictly according to law in listing the lands, assessing the tax, making demand for the same at the proper time and place, advertising for non-payment of tax, &c., and have observed all the requirements of the statutes up to the execution of the deed, surely the tax deed in that case must convey a good title, or our revenue laws are illusory, and the power of the government to raise means by taxation upon the property of its citizens necessary for its own support and action is entirely impotent and vain. But we think a party cannot be required to show that his tax deed has been regularly obtained before he can claim the protection of this statute, since such a construction renders the law unnecessary and useless."

In *Hill v. Kricke*, (6 Wis. R. 442,) the same court held further, that possession by the party claiming under the tax deed was not necessary to the running of the statute; that under the laws of Wisconsin, ejectment would lie against him without actual possession; and that the repeal of the statute after the bar became complete could not affect a title under it thus acquired.

It is not claimed that fraud is an element in the case. The facts show there was none. The only exceptions made in the [ \* 605 ] \* statute which prevent its application are where the taxes are paid before the sale, and where the land is redeemed within the time prescribed by law after the sale.

This case does not fall within either of these exceptions. We have no power to add to them. To do so, would be to usurp the function of another and a distinct governmental department. It would be legislation, and not adjudication. *Cocke & Jack v. McGinnis*, (1 Martin & Yerger, 264, (Mr. Justice Catron's opinion;)) *Troup v. Smith*, (20 J. R. 33;) *Leonard v. Pitney*, (5 Wend. 30;) *Howell v. Hair*, (15 Alabama, 194;) *Beckford v. Wade*, (17 Vesey, jr. 87.)

The lapse of the time limited by such statutes not only bars the remedy, but it extinguishes the right, and vests a perfect title in the adverse holder. "It tolls the entry of the person having the right, and consequently, though the very right be in the defendant, yet he cannot justify his ejecting the plaintiff." Buller's N. P. 103; *Stocker v. Berney*, (1 Lord Raymond, 741;) *Taylor v. Hord*, (1 Burr. 60;) *Barwick v. Thompson*, (7 Term. Rep. 492;) *Beckford v. Wade*, (17 Vesey jr. 87;) *Moore v. Luce*, (29 Penn. R. 260;) *Thompson v. Greene*, (4 Ohio S. R. 223;) *Newcombe v. Leavitt*, (22 Al. Rep. 631;) *Wenn v. Lee*, (5 Georgia Rep. 217;) *Chiles v. Jones, et al.* (4 Dana, 483.)

The instruction refused, and that given, refer to the fact of possession by the defendant below. The statute is silent upon that subject. It begins to run from the time of the recording of the deed, whether possession has or has not been taken. *Hill v. Kricke*, (6 Wis. Rep. 447.)

It was admitted by the stipulation of the parties that the deed in this case was recorded on the 6th of February, 1845. This suit was commenced on the 2d day of October, 1857.

Upon this state of facts the court below instructed the jury: "That the deed being void, neither it nor the subsequent possession under it, for three years after the recording thereof, is a bar to the plaintiff's recovery."

This was clearly an error.

According to the rulings referred to, of the supreme court of the State, it is immaterial whether the sale and the deed be void \*or valid. It is sufficient that a sale has been made, [ \* 606 ] and the deed recorded—to bring the statute into activity—and after the lapse of the period limited, to entitle the purchaser, and those claiming under him, to its protection.

Statutes of limitation are now regarded favorably in all courts of justice. They are "statutes of repose." Usually they are founded in a wise and salutary policy, and promote the ends of justice. *Tolson v. Kage*, (3 Brod. & Bing. 217;) *Lewis v. Marshall*, (5 Pet. 470.)

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Parrish v. Ferris.

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The equities in behalf of the plaintiff below are strong. We have all felt their force. Without any fault on his part, he has been divested of the title to his land. But our duty is to apply the law—not to make it. If this statute be unwise or unjust, the remedial power lies with the legislature of the State, and not with this court.

The judgment of the court below must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

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FRANCIS A. PARRISH, Plaintiff in Error, v. FERRIS and others.

2b 606  
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371 742

2 Black, 606.

RES JUDICATA.

1. A decree of a court of chancery determining and deciding the title, as between the parties to real estate, rendered by a court of competent jurisdiction, is conclusive on both parties to that suit in any other court.
2. This applies to the relations of the State and the federal courts, as well as to other courts, and to a subsequent action of ejectment brought by one of the parties.
3. The decree of the court in a suit to quiet title, brought under the statute of Ohio by one in possession against one out of possession, where the question of title is adjudicated by the decree, is as conclusive upon both parties to that suit as any other decree settling the rights of the parties.

WRIT of error to the circuit court for the southern district of Ohio.

*Mr. Pugh* and *Mr. Worthington*, for plaintiff.

*Mr. Taft* and *Mr. James*, for defendant.

[ \* 607 ] \*Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the circuit court of the United States for the southern district of Ohio.

The action was ejectment to recover possession of certain parcels of land situate in the county of Hamilton.

On the trial the lessor of the plaintiff claimed title to the premises under the will of Andrew Ferris and Elizabeth A. Parrish, his wife, who was a daughter and only child of Andrew Ferris.

The defendants, by way of defense, claimed title also under the same will; and in addition, set up in bar of a recovery a previous suit between the same parties in the courts of the State of Ohio, involving the same title, and in which a judgment or decree was rendered in their favor.

By a statute of Ohio, it is provided that "an action may be

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Parrish v. Ferris.

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brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate or interest therein adverse to him, for the purpose of determining such adverse estate or interest."

In 1853, Francis A. Parrish, under whom the present lessor claims title, being in possession of the premises, instituted proceedings under this statute against the present defendants in the court of common pleas of the county of Hamilton; and in his bill or complaint set forth that he was in possession, holding the same as absolute owner in fee simple, and with the legal title thereto of the premises in question, describing them, and charging that the defendants claimed to have some estate or interest in the same, and prayed that the defendants might be compelled to show what estate or interest in the lands they or any of them might have; that the court might determine and declare that the defendants, nor any of them, had any valid interest or estate therein; and would order that the title of the plaintiff and his possession be established and quieted.

To this bill of complaint the defendants answered, and admit \*the possession of the plaintiff, but deny that he [ \* 608 ] held the same as absolute owner in fee simple, and with the legal title thereto; and then set up title in themselves under the will of Andrew Ferris.

This is the substance of the issue made between the parties. It is very much amplified by the form of the pleadings adopted, which set out the evidence of the facts, instead of the facts themselves. The court, however, look to the substance of the issue, and by that it appears that each party claimed title derived from the will of Andrew Ferris—the plaintiff claiming by devise through his wife, the only child of the testator; the defendants as his brothers and sisters, or their heirs. The title, whether in the one or the other, turned upon a construction of the will of Andrew Ferris, the common source of title.

The court, after consideration, held that the plaintiff took the legal title in the premises, and that the defendants had no title or interest in the same, and gave judgment accordingly; whereupon the defendants appealed to the district court, which, on account of the case involving difficult and important questions of law, sent it to the supreme court for determination.

That court, after holding that no estate passed to the plaintiff under the will of Andrew Ferris and the devise of his wife, and that it passed to the defendants, the brothers and sisters, reversed the decision of the court of common pleas and decreed a dismissal of

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Parrish v. Ferris.

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the bill or complaint and remanded the cause to the district court to have this decree carried into effect.

It will be seen from the above statement of the issue that the precise question in the former suit between these parties, or those under whom they claim, was involved and decided that is presented in the present one; and, further, that the decision of the court could not have been rendered in favor of the defendants in that suit without determining it. In the former suit the question turned upon the construction of the will of Andrew Ferris, which is the question again sought to be raised in the present one, and clearly upon well settled principles this adjudication by a court of concurrent [ \* 609 ] jurisdiction must be regarded as \*final and conclusive between the same parties, unless some special ground is shown to take the case out of the rule.

It has been insisted by the counsel for the plaintiffs in error, that this court is not bound by the decisions of the State courts upon the construction of wills especially, unless that construction has, by the repeated decision of the courts, become a fixed rule of property in the State; and several authorities have been referred to in support of the position. Without expressing any opinion on this question, it is a sufficient answer to say, even admitting the position contended for, it could not help the plaintiff, as it has no application to the present case. This court acknowledges the rule, and has uniformly applied it, of the conclusiveness of a judgment of a court of concurrent jurisdiction between the same parties or their privies upon the same question.

It has also been contended that the power conferred upon the courts by the statute of Ohio, under which the proceedings in the former suit took place, did not enable the court to pass a definitive judgment between the parties upon the legal title. We have not been furnished with any construction of this statute by the supreme court of Ohio as to the extent and effect of this jurisdiction. We can only regret this, and give to the act such an interpretation as seems to us best warranted by its terms, aided by the practical construction derived from the present litigation in the State courts.

The statute authorizes any person in possession of real property to institute a suit against any one who claims an estate or interest therein adverse to him for the purpose of determining such adverse estate or interest. Now it is quite apparent that the title of the defendant to the lands in question is involved under this act, and that the determination of the court must be conclusive against him and all claiming under him as between the parties. If not, the act is of no effect. And it is difficult to see how this determination can

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The United States v. Grimes.

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take place without at the same time necessarily involving the determination of the plaintiff's title. The estate to be determined by the very terms of the act is an estate adverse to the plaintiff, thus raising an issue \* between the estates or titles of [ \* 610 ] the respective parties to the lands in controversy. Again, suppose the determination be, as it was in this case, in favor of the adverse estate, is the adjudication of no effect? Is it binding only when against this estate? We suppose not.

We have said we have been aided upon this point by the practical construction given to the statute in the proceedings of the court below. The pleadings put in issue the legal title to the premises in dispute between the parties—each set up a claim to the title and relied solely upon it. The court of common pleas passed upon this title, and upon nothing else, as did the supreme court on the appeal. It seems quite clear that both the counsel and the courts in these proceedings understood the jurisdiction conferred upon them, as we have endeavored to explain it.

The court of common pleas, which decided the question in favor of the plaintiff, not only adjudged that he had the legal title, but that the defendants had not. The supreme court, on the appeal, having reversed this judgment, directed that the proceedings be remitted to the court below, and there be dismissed.

It was a dismissal of the plaintiff's suit upon the merits, and, of course, as conclusive upon the rights of the parties as any other judgment that might have been rendered in the case.

Judgment of the court affirmed.

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THE UNITED STATES, Appellants, v. GRIMES.

2 Black, 610.

CALIFORNIA LAND GRANTS.

1. This court reasserts that where a grant is confirmed, it enures to the benefit of the assignees of the grantee, and this court having confirmed the claim of the grantor as in Sutter's case, will not consider those of his assignee as a separate claimant.
2. The present claimant asserts a right under Sutter. Sutter's claim has been considered, and eleven leagues confirmed and a much larger amount rejected.
3. It is not the duty of this court to decide whether this claimant is entitled to any part of the eleven leagues or not. He must establish this right by other proceedings.

APPEAL from the district court for the northern district of California.

*Mr. Wills*, for the United States.

No counsel for Grimes.

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The United States v. Grimes.

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[ \* 611 ] \* Mr. Justice GRIER delivered the opinion of the court.

The petitioner is assignee of John A. Sutter "of a part of the place called New Helvetia." Under this name Sutter claimed title to two several grants from the Mexican Government;

[ \* 612 ] one for eleven leagues, granted to him by \* Juan B. Alvarado on 18th of June, 1841, the other for twenty-two leagues, called his "Sobrante grant," purporting to be issued by Micheltorena at Santa Barbara on the 5th of February, 1845. Many persons had purchased portions of this great tract. A separate application from each of those vendees to the commissioners for a several confirmation of the portion assigned to him, would have caused great expense, trouble and delay. Accordingly, Sutter, very properly, filed his petition for the confirmation of these two grants, for the benefit of himself and his several assignees. His title has been fully considered and decided by this court. (See 21 Howard, 178.) The first grant of eleven leagues was adjudged valid, the other was rejected. The patent to Sutter for the eleven leagues will, of course, enure to the benefit of all his vendees. Those who claim under the Sobrante title will take nothing. Whether the portions sold will be found within either or neither of these grants to Sutter, must depend upon surveys made, or to be made, since the confirmation of his grant by this court. It is true, the assignee of a Mexican title may present his case before the commissioners; and where he is assignee of the whole claim there may be no impropriety in it. But, if the land claimed has been divided out among a thousand vendees, as in this case, the proper party to the proceeding is the original grantee, who can produce the documents of title and who best knows how to establish it. As in the case of Neleigh, (1 Black. 298,) who claimed a part of the grant to Castro, which had been rejected by this court, we may say, that though the assignee is not absolutely estopped by a decree of the court to which he was not a party, yet as he has furnished no new evidence to show that decree erroneous, he cannot expect the court to change it. If any part of the land for which he has petitioned is within the eleven leagues, the patent which has or will be given to Sutter will confirm his title, and further proceedings in this suit would be wholly superfluous. The government cannot be required to give two patents for the same land, one to the vendor and another to the vendee. Where there are divers vendees under one original title, and the Mexican grantee has filed his petition

[ \* 613 ] before the commissioners for a \* confirmation of his title, and there are others, his assignees, who have petitioned also, the commissioners should have consolidated all the cases.



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The law does not require them to locate the boundaries of the several grantees or settle any disputes between them, or to give a thousand different patents to every several claimant of a town lot. It is their duty to establish the boundary as well as validity of the Mexican grant as between him and the government, and not to arbitrate the disputes of the several assignees.

The court below confirmed the whole claim of the petitioner, because it was within the thirty-three leagues which they had already confirmed to Sutter. But, as that judgment was reversed as to twenty-two leagues, the judgment in this case must have the same course. If any portion of his claim be found within the eleven leagues, he needs no further title; if it does not, he can have none.

The judgment and decree of the court below is reversed.

ROTHWELL, Appellant, v. DEWEES and others.

2 Black, 613.

EQUITY.—FIDUCIARY RELATIONS.—TAX TITLES.

1. In a suit between proper parties in a court of equity to adjust among themselves the equitable title or interest in real estate, a third person, whose title, if he has any, is strictly legal, and is adverse to all the other parties, cannot intervene in such suit, where there is no obstruction to the assertion of his title in a court of law.
2. The trustee for the creditors of an insolvent firm holds no such fiduciary relation to the heirs of one of that firm as to enable the latter to sue in equity.
3. Nor do purchasers from said heirs, who are parties to the original bill, stand in any different attitude.
4. A person who agrees to act as agent to pay taxes for another, and enters upon that duty, cannot, without notice, change his relation and buy in the property at the tax sale for himself, and thereby obtain a valid title. A title so obtained enures in equity to the benefit of the principal whom he represented.
5. Where two devisees or tenants in common hold under an imperfect title, and one of them buys in an outstanding title, such purchase will enure to the benefit of all the tenants, upon contribution on their part to repay the purchase money.
6. This principle applies as forcibly to the husband of a *feme* tenant in common who buys in the outstanding title or incumbrance as to one of the immediate co-tenants.

APPEAL from the circuit court for the District of Columbia.

*Mr. Bradley*, for appellants.

*Mr Swan*, for appellees.

\* Mr. Justice MILLER delivered the opinion of the court. [\* 614]

The appellees in this case, who were the defendants in the circuit court, hold the real estate, which is the subject of this controversy, by inheritance from their father, William Dewees.

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Rothwell v. Dewees.

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The title of Dewees was a deed from the corporation of Washington city, made August 29, 1836, on a sale for taxes. It seems to be admitted on all sides that this deed vested the legal title in Dewees, and that it is valid in his heirs, unless the plaintiffs shall be permitted to redeem from said sale, and have the deed set aside for reasons set forth by them in their bill.

The property in question was conveyed by Robert Morris, in 1796, to Joseph Ball and Standish Forde. Forde was then doing business in Philadelphia as a merchant, in partnership with one John Reed, and died about the year 1806 or 1807, leaving the mercantile firm insolvent. Shortly after Forde's death, Reed, the surviving partner, conveyed all the partnership property to William Paige, of Philadelphia, by deed of assignment for the benefit of creditors; and in the schedule attached to the instrument of assignment is included the property thus conveyed by Morris to Ball & Forde. This instrument is dated December 12, 1807.

On the 18th of September, 1833, William Paige, as assignee of Reed, surviving partner of Reed & Forde, entered into a written agreement with William Dewees, the defendant's ancestor, in reference to this property; the substance of which is briefly this:

[ \* 615 ] \* Dewees was to take charge of the property, and redeem it from any tax sales which had already been made, and for which the time of redemption had not expired. He was to pay all future taxes, and all the expenses incident to sales of lots to be made by himself, for which he was furnished with a power of attorney by Paige. The money for all these taxes and expenses he was to advance, except a sum of about two or three hundred dollars, which was supposed to be in the hands of the treasurer of Washington city, belonging to Reed & Forde, arising in some way out of sales for taxes already made. His compensation for all this was, that, after deducting his advances and interest from the proceeds of sales made by him, he was to have one-third of the remainder of such proceeds.

It appears that Dewees acted fairly under this arrangement for about three years; making advances to redeem the property where it had been sold for taxes, and paying the accruing taxes, until he had advanced about \$900. He then, not having sold any of the property, nor realized anything from it in any other way, permitted it to be sold for taxes and bought it in himself, and took the corporation deed already mentioned of the 29th of August, 1836. He died on the 3d of September following. On the 10th of April, 1837, Paige, the assignee, by regular power of attorney, appointed

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Andrew Rothwell, one of the complainants, his agent, with authority to sell lots, to procure partition, and to make settlement with the heirs and representatives of Dewees. In 1841, Robert Smith was, by a decree of court, appointed assignee in place of Paige, who had died; and in 1846 said Smith quit claimed, and released to Rothwell all the right, title, and interest which he had as such assignee in the property now in dispute. The complainant, Rothwell, also procured deeds of conveyance to himself and his co-plaintiffs, Naylor and Smith, from several persons describing themselves as heirs of Standish Forde, of their interest in the same property.

Rothwell, Smith, and Naylor then filed their bill in chancery against the defendants, one of whom is Rothwell's wife, praying to be permitted to pay the sum with interest which William

\* Dewees had paid for his tax deed, and to have said deed [ \* 616 ] set aside.

After the suit had progressed for some time, the other appellant, Robert S. Forde, filed a petition to be admitted as a party plaintiff, on the ground that he was a grandson and an heir-at-law of Standish Forde, and entitled to redeem for his share.

The court dismissed or overruled the petition of Robert S. Forde to be made a party, and, on final hearing, it dismissed the bill as to complainants, Naylor and Smith, and decreed that Rothwell, in his purchase from Robert H. Smith, the assignee of John Reed, should be held to be trustee for himself and wife, and the other defendants, heirs of Dewees; and that the defendants should make contribution to him, in payment of the sum so paid by him to Smith, and for taxes afterward paid by him on the property.

From this decree Robert S. Forde and the original complainants appeal.

The first question to be considered arises from the action of the court in dismissing Forde's petition. It is clear that if Forde had any title or interest in the property, it was a legal title, and no obstruction is seen to the assertion of that legal title against the defendants, in a court of law.

That court is the appropriate one to settle the conflict growing out of the legal title derived by Robert S. Forde from his ancestor, and the title claimed by defendants under the tax deed from the city of Washington. If he has any right to redeem from the sale for taxes it must be a legal right, which he can exercise without the aid of a court of chancery. In his petition asking to be made a party, he claims that Dewees must be considered as the agent of Forde's heirs, as well as the agent of Reed's assignee, under his agreement with Paige. This claim, however, cannot be sustained.

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The partnership of Reed & Forde was insolvent. The assignment was made for the benefit of creditors, and the claim of the assignee to the lots in question was adverse to the claim of Forde's heirs.

The assignee had thus claimed them for nearly thirty years, [ \* 617 ] when Dewees became the agent of Paige. \* There can be no pretense then that Dewees was agent for Forde's heirs, or occupied towards them any relation of trust or confidence. No ground of equitable jurisdiction is perceived on which Robert S. Forde could assert his title in a court of chancery against the defendants, and his petition was properly overruled.

The next objection to the decree, namely, the dismissal of the bill as to complainants, Naylor and Smith, is based upon almost the same ground as that just considered. These parties have conveyances from individuals, who describe themselves in the deeds as heirs of Standish Forde, and in addition to this the bill alleges that they were partners in the purchase made by Rothwell from the assignee of Reed. If it be admitted that the parties who made the conveyance to Naylor and Smith were the heirs of Standish Forde, it would not place those complainants in any other or better position than that of Robert S. Forde. But Naylor and Smith being original plaintiffs, had an opportunity to prove their case at the final hearing, and failed to produce any evidence that their grantors were the heirs of Forde. It cannot be pretended that the recital of that fact in their deeds can be evidence against parties not claiming under them, and we have failed to discover any other evidence of it in the record.

Nor is there any evidence that these parties were interested in the purchase made by Rothwell from Smith, the assignee. If that fact, however, were established, we do not see that they could claim any better position than Rothwell, since they permitted him to take the conveyance to himself, without any mention of their rights in the purchase.

We come now to consider that portion of the decree which concerns Rothwell and the defendants. This must be supported, if at all, upon the two-fold operation of the principle that a purchase of an outstanding title or interest in property, by a person sustaining certain relations to others interested in the same property, should, at the option of the latter, enure to their benefit; the application being in this case made, first, to the purchase of the tax [ \* 618 ] title by Dewees, agent for Paige, the assignee; and, \*secondly, to the purchase made by Rothwell from the assignee, he being the husband of one of the tenants in common who held the property as heirs of Dewees.

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So far as the tax title acquired by Dewees is concerned, there can be no doubt that the principle is correctly applied. As the agent of Paige, it was his duty to pay these taxes, and to prevent the sale of the lots. In violation of this duty he permitted the lots to be sold, and himself became the purchaser. Besides his general duty as agent, he had expressly covenanted, in writing, that he would, out of his own funds, advance the money and pay these taxes. There is nothing in law or morality plainer than that this purchase must be held to be in trust for the benefit of his principal, on repayment of the sum advanced by him. 1 Story Eq., sections 315, 1211, 1211a; Story on Agency, sections 210, 211; 8 Vesey R. 337. The defendants, who are his heirs, can stand in no better condition than he would if he were alive.

In regard to the application of the principle to the purchase of Rothwell from Smith, the successor of Paige in the assignment, it is claimed by defendants, that Rothwell is to be treated as having a common interest with them in the title derived from Dewees, and that his purchase of the outstanding equity of Reed's assignee must enure to the common benefit of the co-tenants of that title.

In the case of *Van Horne v. Fonda*, (5 Johns. Chy. R. 407,) the rule is very fully laid down by Chancellor Kent, that where two devisees or tenants in common hold under an imperfect title, and one of them buys in the outstanding title, such purchase will enure to their common benefit upon contribution made to repay the purchase money. The same point is also decided in *Farmer and Arnold v. Samuels, et al.*, (4 Littell R. 187.) The soundness of the principle is not denied by counsel for plaintiff, as applicable to persons strictly tenants in common, or joint tenants, or others having an equality of interest or estate; but it is said that the complainant in this case is not tenant in common, but that his interest is at most only tenant by the courtesy of his wife's interest, and that even that is doubtful; and that there is no \*equality of [\* 619] interest as between him and the defendants. In this connection much stress is laid by counsel upon the language of the court in *Van Horne v. Fonda*, to the effect that in that case there was an equality of estate between the co-devisees. It does not appear to us, however, that any particular force was given to that fact by the learned judge, but rather that the rule was based on a community of interest in a common title, which created such a relation of trust and confidence between the parties, that it would be inequitable to permit one of them to do anything to the prejudice of the other, in reference to the property so situated. It seems to us that the true reason of the rule applies as forcibly to the husband of

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a tenant in common, as to one of the immediate co-tenants. This seems also to have been the opinion of the court of appeals of Kentucky in the case of *Lee and Graham v. Fox*, (6 Dana's R. 176.) It was decided in that case that the husband of a co-heiress, who had purchased an outstanding incumbrance on the lands of the heirs should be held to have purchased for the benefit of all the tenants, upon condition only that they should contribute their respective proportion of the consideration actually paid for the incumbrance.

We are quite satisfied with this as a rule of equity, sustained as it is by authority and sound principles of morality, and as the decree of the circuit court was in conformity to it, it must be affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, AT THE RELATION OF THE  
BANK OF COMMERCE, Plaintiffs in Error, v. THE COMMISSIONERS OF  
TAXES FOR THE CITY AND COUNTY OF NEW YORK.

2b 620  
L-ed 451  
133 666

2 Black, 620.

CONSTITUTIONAL LAW—TAXATION OF NATIONAL SECURITIES.

1. The statute of New York, under which the tax is levied which is here in dispute, is a tax upon the capital of the stock at its assessed value in whatever it may be invested, and is not a tax upon its nominal capital stock, without regard to its value.
2. The latter tax might be sustained as a tax upon the franchise of banking, without regard to the kind of property in which the capital was invested. The former is no such tax, but is a tax upon property according to its value.
3. Where it is made to appear that the capital on which the tax is thus assessed as a whole is largely invested in stock, bonds, or other securities of the United States, it is a tax to that extent upon those securities.
4. Such a tax, if permitted, would enable the States to tax the loans, bonds, and other securities out of the markets of the States, and would in effect place the power of the general government to borrow money at the mercy or discretion of the States.
5. Such a power in the States is therefore inconsistent with the power conferred on the United States by its constitution to borrow money, and any State law which authorizes such a tax is void.

WRIT of error to the court of appeals of the State of New York.  
The facts are fully stated in the opinion.

*Mr. David Lord*, for plaintiffs.

*Mr. Devlin and Mr. Brady*, for defendants.

[ \* 628 ] \*Mr. Justice NELSON delivered the opinion of the court.  
This is a writ of error to the court of appeals of the State of New York.

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Bank of Commerce v. New York City.

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The question involved in this case is, whether or not the stock of the United States, constituting a part or the whole of the capital stock of a bank organized under the banking laws of New York, is subject to State taxation. The capital of the bank is taxed under existing laws in that State upon valuation like the property of individual citizens, and not as formerly on the amount of the nominal capital, without regard to loss or depreciation.

\*According to that system of taxation it was immaterial [ \* 629 ] as to the character or description of property which constituted the capital, as the tax imposed was wholly irrespective of it. The tax was like one annexed to the franchise as a royalty for the grant. But since the change of this system, it is agreed the tax is upon the property constituting the capital. ^

This stock then is held by the bank the same as such stocks are held by individuals, and alike subject to taxation, or exemption by State authority. On the part of the bank it is claimed that the question was decided in the case of *Weston et als., v. The City Councils of Charleston*, (2 Peters, 449,) in favor of exemption. In that case the stocks were in the hands of individuals which were taxed by the city authorities under a law of the State. The court held the law imposing the tax unconstitutional. This decision would seem not only to cover the case before us, but to determine the very point involved in it.

It has been argued, however, that the form or mode of levying the tax under the ordinance of the city of Charleston was different from that of the law of New York, and hence may well distinguish the case and its principles from the present one. This difference consists in the circumstance that the tax in the former case was imposed on the stock, *eo nomine*, whereas in the present it is taxed in the aggregate of the tax-payer's property, and to be valued at its real worth in the same manner as all other items of his taxable property. The stock is not taxed by name, and no discrimination is made in favor or against it, but is regarded like any other security for money or chose in action. .

It is true that the ordinance imposing the tax in the case of *Weston v. The City of Charleston*, did discriminate between the stock of the United States and other property—that is, the ordinance did not purport to impose a tax upon all the property owned by the tax payers of the city, and specially excepted certain property altogether from taxation. The only uniformity in the taxation was, that it was levied equally upon the articles enumerated, and which were taxed. To this extent it might be regarded as a tax on the stock *eo nomine*.

[ \* 630 ] \* But does this distinction thus put forth between the two cases distinguish them in principle? The argument admits that a tax *eo nomine*, or one that distinguishes unfavorably the stock of the United States from the other property of the tax payer, cannot be upheld. Why? Because, as is said, if this power to discriminate be admitted to belong to the State, it might be exercised to the destruction of the value of the stock, and consequently of the power or function of the federal government to issue it for any practical uses.

It will be seen, therefore, that the distinction claimed rests upon a limitation of the exercise of the taxing power of the State; that if the tax is imposed indiscriminately upon all the property of the individual or corporation, the stock may be included in the valuation; if not, it must be excluded or cannot be reached. The argument concedes that the federal stock is not subject to the general taxing power of the State, a power resting in the discretion of its constituted authorities as to the objects of taxation, and the amount imposed. It is true that in many, if not in all of the constitutions of the States, provisions will be found confining the power of the legislature to the passage of uniform laws in the taxation of the real and personal property within her jurisdiction. But this is a restraint upon the power imposed by the State itself. In the absence of any such restriction discrimination in the tax would rest in the discretion of the legislature. Whether regulated by the constitution or by the act of the legislature is a question of State policy, to be determined by the people in convention or by the legislature. In either case the power to discriminate or not is in the State. How then can this limitation upon the taxing power of a State, which the argument assumes may be used to discriminate against the federal stocks, be enforced? The power to enforce it must be independent of the State to be effectual. There can be but one answer to this question, and that is: by the supreme judicial tribunal of the Union. But is this court a fit tribunal to sit in judgment upon the question whether the legislature of a State has exercised its taxing power wisely or unwisely over objects [ \* 631 ] \* of taxation, confessedly, as the argument assumes, within its discretion?

And is the question a judicial question? We think not. There is and must always be a considerable latitude of discretion in every wise government in the exercise of the taxing power, both as to the objects and the amount, and of discrimination in respect to both. Property invested in religious institutions, seminaries of learning, charitable institutions, and the like, are examples. Can



any court say that these are discriminations which, upon the argument that seeks to distinguish the present from the case of *Weston v. The City of Charleston*, would or would not take it out of that case? A court may appropriately determine whether property taxed was or was not within the taxing power, but if within, not that the power has or has not been discreetly exercised. We cannot, therefore, yield our assent to the soundness of the distinction taken by the counsel between this case and the one referred to.

Upon looking at the case of *Weston v. The City of Charleston*, it will be seen that the decision of a majority of the court was not at all placed upon the distinction we have been considering, but upon ground much broader and wholly independent of it.

The tax upon the stocks was regarded as a tax upon the exercise of the power of congress "to borrow money on the credit of the United States." The exercise of this power was interfered with to the extent of the tax imposed by the city authorities, that the liability of the certificates of stock to taxation by a State in the hands of an individual affected their value in the market, and the free and unrestrained exercise of the power. The chief justice observes, that "if the right to impose a tax exists, it is a right which, in its nature, acknowledges no limits. It may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State or corporation may prescribe."

He then refers to the taxing power of the State, its importance, and extensive operation, and the delicacy and difficulty of fixing any limit to its exercise; and that in the performance of this duty, which had, in other cases, devolved on the court, it was \*considered as a necessary consequence of the su- [\* 632] premacy of the federal government that its action in the exercise of its legitimate powers should be free and unembarrassed by any conflicting powers of the States, and that the powers of a State cannot rightfully be so exercised as to impede and obstruct the free course of those measures which this government may rightfully adopt.

He further observed, that "the sovereignty of a State extends to everything which exists by its own authority or is introduced by its permission, but not to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States. The attempt to use the power of taxation on the means employed by the government of the Union in pursuance of the constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give," and the chief justice then adds, "a contract made by the

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government in the exercise of its powers to borrow money on the credit of the United States, is undoubtedly independent of the will of any State in which the individual who lends may reside, and is undoubtedly an operation essential to the important objects for which the government was created."

It is apparent in studying this opinion in connection with the opinions of the court in the cases of *McCullough v. The State of Maryland*, (4 Wh. 116,) and of *Osborne v. The United States*, (9 Wh. 732,) that it is but a corollary from the doctrines so ably expounded by the chief justice in the two previous cases in the interpretation of an analogous power in the constitution.

The doctrine maintained in those cases is, that the powers granted by the people of the States to the general government, and embodied in the constitution, are supreme within their scope and operation, and that this government may exercise these powers in its appropriate departments, free and unobstructed by any State legislation or authority. That within this limit this government is sovereign and independent, and any interference by the State governments, tending to the interruption of the full legitimate exercise of the powers thus granted, is in conflict with [ \* 633 ] that clause of the constitution which makes the \* constitution and the laws of the United States passed in pursuance thereof "the supreme law of the land."

The result of this doctrine is, that the exercise of any authority by a State government trenching upon any of the powers granted to the general government is, to the extent of the interference, an attempt to resume the grant in defiance of constitutional obligation; and more than this, if the encroachment or usurpation to any extent is admitted, the principle involved would carry the exercise of the authority of the State to an indefinite limit, even to the destruction of the power. For, as truly said by the chief justice in the case of *Weston v. The City of Charleston*, in respect to the taxing power of the State, "if the right to impose the tax exists, it is a right which, in its nature, acknowledges no limit, it may be carried to any extent within the jurisdiction of the State or corporation which imposes it, which the will of each State and corporation may prescribe."

An illustration of this principle in respect to the powers of the judicial department of this government, is found in the case of *The United States v. Peters*, (5 Cranch, 115.) There the legislature of the State of Pennsylvania attempted to annul the judgment of a court of the United States, and destroy all rights acquired under it. It was quite apparent, if the exercise of that power could be

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admitted; the principle involved might annihilate the whole power of the federal judiciary within the State. The act of the legislature did not profess to exercise this power generally, but only in the particular case, on the ground that the court had no jurisdiction. But the chief justice, in giving the opinion of the court, very naturally observes, that the right to determine the jurisdiction of the courts was not placed by the constitution in the State legislatures, but in the supreme judicial tribunal of the nation. If time allowed, many other cases might be referred to, illustrating the principle in respect to other departments of this government.

The conclusive answer to the attempted exercise of State authority in all these cases is, that the exercise is in derogation of the powers granted to the general government, within which, it is admitted, it is supreme. That government whose powers, \* executive, legislative or judicial, whether it is a govern- [ \* 634 ] ment of enumerated powers like this one, or not, are subject to the control of another distinct government, cannot be sovereign or supreme, but subordinate and inferior to the other. This is so palpable a truth that argument would be superfluous. Its functions and means essential to the administration of the government, and the employment of them, are liable to constant interruption and possible annihilation. The case in hand is an illustration. The power to borrow money on the credit of the United States is admitted. It is one of the most important and even vital functions of the general government, and its exercise a means of supplying the necessary resources to meet exigencies in times of peace or war. But of what avail is the function or the means if another government may tax it at discretion. It is apparent that the power, function, or means, however important and vital, are at the mercy of that government. And it must be always remembered, if the right to impose a tax at all exists on the part of the other government, "it is a right which in its nature acknowledges no limits." And the principle is equally true in respect to every other power or function of a government subject to the control of another.

In our complex system of government it is oftentimes difficult to fix the true boundary between the two systems, State and federal. The chief justice, in *McCullough v. The State of Maryland*, endeavored to fix this boundary upon the subject of taxation. He observed, "if we measure the power of taxation residing in a State by the extent of sovereignty which the people of a single State possess, and can confer on its government, we have an intelligible standard applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and

## The Prize Cases.

property unimpaired, which leaves to a State the command of all its resources, and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States and safe for the Union."

[ \* 635 ] \*All will agree that this is the enunciation of a true principle, and it is only by a wise and forbearing application of it that the operation of the powers and functions of the two governments can be harmonized. Their powers are so intimately blended and connected that it is impossible to define or fix the limit of the one without at the same time that of the other in respect to any one of the great departments of government. When the limit is ascertained and fixed, all perplexity and confusion disappear. Each is sovereign and independent in its sphere of action, and exempt from the interference or control of the other, either in the means employed or functions exercised, and influenced by a public and patriotic spirit on both sides, a conflict of authority need not occur or be feared.

Judgment of the court below is reversed.

## THE PRIZE CASES.

THE BRIG AMY WARWICK.

THE BARK HIAWATHA.

THE SCHOONER BRILLIANTE.

THE SCHOONER CRENSHAW.

2 Black, 635.

ADMIRALTY—PRIZE IN CIVIL WAR—BLOCKADE—ENEMY PROPERTY—WHO ARE ENEMIES IN A CIVIL WAR.

1. The first question to be determined in these cases is whether, at the time of the capture of the several vessels above named, there existed a lawful blockade which they are charged with violating.
2. There can be no lawful blockade without the existence of war—such war as will justify a resort to this mode of subduing the hostile force.
3. A war may exist when one of the belligerents claims sovereign rights as against the other. Where a party in rebellion occupy and hold in a hostile manner a certain portion of territory, have cast off their allegiance and declared their independence, have organized armies and commenced hostilities against their sovereign, the world acknowledges them as belligerents and the contest as a war.
4. A civil war is never solemnly declared. An insurrection becomes such by the amount of its numbers, power, organization, and purpose of those who take part in it; and the lawful government exerts itself to put it down without a formal declaration of war against it.

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The Prize Cases.

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5. But the actual existence of such a war may, from its very nature, become a fact in the domestic history of the country of which the courts must take judicial notice.
6. Where the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that courts of justice cannot be kept open, civil war exists, and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land.
7. It was the right and duty of the President of the United States, in the absence of congress, to recognize and to meet this condition of actual territorial war which he did not inaugurate or proclaim; and as the war was a *fact* which could not be ignored, it was within the scope of his authority to institute the blockade of the hostile ports.
8. Neutrals were bound to respect this blockade as much as any other.
9. The present civil war has assumed a territorial character, dividing the country into two parts by a line of bayonets. All persons residing south of this line are, by virtue of their domicile, enemies in this war to the government.
10. As the principle on which the right of belligerent capture on the high seas is, that property, unless captured, may, by reason of the residence of its owner, come to be used in aid of the public enemy, the other side has the right to capture it as a means of crippling that enemy's resources.
11. This principle applies to citizens of the United States domiciled within the rebel lines, without regard to the part they may have taken in the war or their sentiments on the subject.
12. Nor is the government forbidden to exercise this right of war by the fact that it is sovereign and can punish criminals, nor by any of the provisions of the constitution. The government is at liberty to exercise its right of sovereignty, or the rights which a state of war gives it, without consulting its enemies.
13. As to the *Amy Warwick*, the owners of the vessel and the cargo were all residents of Richmond, Virginia, and, without reference to the blockade, the vessel and cargo were both rightfully condemned as enemy property.
14. As to the *Hiawatha*, we are of opinion that the British minister had a right, from his correspondence with the state and navy departments, to believe that fifteen days after notice of blockade would be allowed for foreign vessels to leave the ports.
15. But in order to obtain an enemy cargo she remained until after the expiration of the fifteen days, and thus voluntarily subjected herself to the danger of capture.
16. There is no provision in the proclamation of blockade for warning vessels. If there was any such warning necessary, it could only apply to vessels coming into port, and in no event could it be necessary as to a vessel which had full knowledge of the blockade and was in correspondence with the government about it. The cargo must share the fate of the vessel, and both were properly condemned for violation of the blockade.
17. The *Brillante*: the evidence in this case shows that the owner of the vessel, who was aboard, violated the blockade of New Orleans, after warning, in entering that port, and was captured in attempting to violate the blockade by escaping with a cargo. Both vessel and cargo were properly condemned.
18. In regard to the *Crenshaw*, the only question is of enemy property. The vessel and a large part of her cargo were owned by residents of Richmond, Virginia, and were properly condemned. The claim of the firm of Ludlam & Watson, for part of the cargo, must be governed by the fact of the residence of Watson, the active member of the firm in Richmond.
19. Irvin & Co., of New York, had tobacco on board, purchased in Richmond before the commencement of hostilities. Whether they had the right to withdraw this generally after the war or not, they should have the benefit of the fifteen days' grace allowed to others, and thus protect their property.

## The Prize Cases.

THESE cases, though separate in their importance, and arising from appeals from different district courts, were considered by the court together, and full argument by counsel was allowed, and very able presentations of the law of blockade were made to the court.

The two great questions presented were the right of the government to establish a blockade of its own ports in a civil war growing out of an insurrection, and the right of the president to institute such a blockade in the absence of any act of congress declaring or recognizing a state of war. These questions are fully discussed, with statements of the facts out of which they arose, in the opinion of the court and the dissenting opinion.

The government and the libelants were represented in the argument by *Mr. Dana*, of Massachusetts; *Mr. Eames*, of Washington; *Mr. Evarts* and *Mr. Sedgwick*, of New York.

The claimants, by *Mr. Lord*, *Mr. Edwards*, and *Mr. Donohue*, of New York; *Mr. Bangs*, of Massachusetts, and *Mr. Carlisle*, of Washington.

[ \* 665 ] \*Mr. Justice GRIER delivered the opinion of the court.

There are certain propositions of law which must necessarily affect the ultimate decision of these cases, and many others, which it will be proper to discuss and decide before we notice the special facts peculiar to each.

They are, 1st. Had the president a right to institute a blockade of ports in possession of persons in armed rebellion against the government, on the principles of international law, as known and acknowledged among civilized States?

2d. Was the property of persons domiciled or residing within those States a proper subject of capture on the sea as "enemies' property?"

I. Neutrals have a right to challenge the existence of a blockade *de facto*, and also the authority of the party exercising the right to institute it. They have a right to enter the ports

[ \* 666 ] \*of a friendly nation for the purposes of trade and commerce, but are bound to recognize the rights of a belligerent engaged in actual war, to use this mode of coercion, for the purpose of subduing the enemy.

That a blockade *de facto* actually existed, and was formally declared and notified by the president on the 27th and 30th of April, 1861, is an admitted fact in these cases.

That the president, as the executive chief of the government and

## The Prize Cases.

commander-in-chief of the army and navy, was the proper person to make such notification, has not been, and cannot be disputed.

The right of prize and capture has its origin in the "*jus belli*," and is governed and adjudged under the law of nations. To legitimate the capture of a neutral vessel or property on the high seas, a war must exist *de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in possession of the other.

Let us inquire whether, at the time this blockade was instituted, a state of war existed which would justify a resort to these means of subduing the hostile force.

War has been well defined to be, "That state in which a nation prosecutes its right by force."

The parties belligerent in a public war are independent nations. But it is not necessary to constitute war that both parties should be acknowledged as independent nations or sovereign States. A war may exist where one of the belligerents claims sovereign rights as against the other.

Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power, and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities \*against their [\* 667] former sovereign, the world acknowledges them as belligerents, and the contest a *war*. *They* claim to be in arms to establish their liberty and independence, in order to become a sovereign State, while the sovereign party treats them as insurgents and rebels who owe allegiance, and who should be punished with death for their treason.

The laws of war, as established among nations, have their foundation in reason, and all tend to mitigate the cruelties and misery produced by the scourge of war. Hence the parties to a civil war usually concede to each other belligerent rights. They exchange prisoners, and adopt the other courtesies and rules common to public or national wars.

"A civil war," says Vattel, "breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other as

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enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies. Having no common superior to judge between them, they stand in precisely the same predicament as two nations who engage in a contest and have recourse to arms.

"This being the case, it is very evident that the common laws of war—those maxims of humanity, moderation and honor—ought to be observed by both parties in every civil war. Should the sovereign conceive he has a right to hang up his prisoners as rebels, the opposite party will make reprisals, &c., &c.; the war will become cruel, horrible, and every day more destructive to the nation."

As a civil war is never publicly proclaimed, *eo nomine* against insurgents, its actual existence is a fact in our domestic history which the court is bound to notice and to know.

The true test of its existence, as found in the writing of the sages of the common law, may be thus summarily stated: "When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the courts of justice cannot be kept [ \* 668 ] open, *civil war exists*, and hostilities may be prosecuted \* on the same footing as if those opposing the government were foreign enemies invading the land."

By the constitution, congress alone has the power to declare a national or foreign war. It cannot declare war against a State, or any number of States, by virtue of any clause in the constitution. The constitution confers on the president the whole executive power. He is bound to take care that the laws be faithfully executed. He is commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States. He has no power to initiate or declare a war either against a foreign nation or a domestic State. But by the acts of congress of February 28th, 1795, and 3d of March, 1807, he is authorized to call out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.

If a war be made by invasion of a foreign nation, the president is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority. And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be "*unilateral*." Lord Stowell (1 Dodson, 247) observes, "It is not the



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less a war on *that account*, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only, is not a mere challenge to be accepted or refused at pleasure by the other."

The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of congress of May 13th, 1846, which recognized "*a state of war as existing by the act of the republic of Mexico.*" This act not only provided for the future prosecution of the war, but was itself a vindication and ratification of the act of the president in accepting the challenge without a previous formal declaration of war by congress.

This greatest of civil wars was not gradually developed by \* popular commotion, tumultuous assemblies, or local [\* 669] unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The president was bound to meet it in the shape it presented itself, without waiting for congress to baptize it with a name; and no name given to it by him or them could change the fact.

It is not the less a civil war, with belligerent parties in hostile array, because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged in order to constitute it a party belligerent in war according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of the Santissima Trinidad, (7 Wheaton, 337,) this court say: "The government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war." (See also 3 Binn. 252.)

As soon as the news of the attack on Fort Sumter, and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit, on the 13th of May, 1861, the queen of England issued her proclamation of neutrality, "recognizing hostilities as existing between the government of the United States of America and *certain States* styling themselves the Confederate States of America." This was immediately followed by similar declarations or silent acquiescence by other nations.

After such an official recognition by the sovereign, a citizen of a

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foreign State is estopped to deny the existence of a war with all its consequences as regards neutrals. They cannot ask a court to affect a technical ignorance of the existence of a war, which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the government and paralyze its power by subtle definitions and ingenious sophisms.

The law of nations is also called the law of nature; it is founded on the common consent as well as the common sense of the world. It contains no such anomalous doctrine as that which this court are now for the first time desired to pronounce, to wit: That insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies, and commenced hostilities, are not *enemies* because they are *traitors*; and a war levied on the government by traitors, in order to dismember and destroy it, is not a *war* because it is an "insurrection."

Whether the president in fulfilling his duties, as commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this court must be governed by the decisions and acts of the political department of the government to which this power was intrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case.

The correspondence of Lord Lyons with the secretary of state admits the fact and concludes the question.

If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the legislature of 1861, which was wholly employed in enacting laws to enable the government to prosecute the war with vigor and efficiency. And finally, in 1861, we find congress "*ex majore cautela*" and in anticipation of such astute objections, passing an act "approving, legalizing, and making valid all the acts, proclamations, and orders of the president, &c., as if they had been *issued and done under the previous express authority* and direction of the congress of the United States."

[ \*671 ] \* Without admitting that such an act was necessary under the circumstances, it is plain that if the president had in any manner assumed powers which it was necessary should

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have the authority or sanction of congress, that on the well-known principle of law, "*omnis ratihabitio retrotrahitur et mandato equiparatur*," this ratification has operated to perfectly cure the defect. In the case of *Brown v. United States*, (8 Cr. 131, 132, 133,) Mr. Justice Story treats of this subject, and cites numerous authorities to which we may refer to prove this position, and concludes, "I am perfectly satisfied that no subject can commence hostilities or capture property of an enemy, when the sovereign has prohibited it. But suppose he did, I would ask if the sovereign may not ratify his proceedings, and thus by a retroactive operation give validity to them?"

Although Mr. Justice Story dissented from the majority of the court on the whole case, the doctrine stated by him on this point is correct and fully substantiated by authority.

The objection made to this act of ratification, that it is *ex post facto*, and therefore unconstitutional and void, might possibly have some weight on the trial of an indictment in a criminal court. But precedents from that source cannot be received as authoritative in a tribunal administering public and international law.

On this first question, therefore, we are of the opinion that the president had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion, which neutrals are bound to regard.

II. We come now to the consideration of the second question. What is included in the term "*enemies' property*?"

Is the property of all persons residing within the territory of the States now in rebellion, captured on the high seas, to be treated as "*enemies' property*?" whether the owner be in arms against the government or not?

The right of one belligerent not only to coerce the other by direct force, but also to cripple his resources by the seizure or destruction of his property, is a necessary result of a state of war. Money and wealth, the products of agriculture and commerce, are said to be the sinews of war, and as necessary [\* 672] in its conduct as numbers and physical force. Hence it is, that the laws of war recognize the right of a belligerent to cut these sinews of the power of the enemy, by capturing his property on the high seas.

The appellants contend that the term "*enemy*" is properly applicable to those only who are subjects or citizens of a foreign State at war with our own. They quote from the pages of the common law, which say, "that persons who wage war against the king may be of two kinds, subjects or citizens. The former are not proper

enemies, but rebels and traitors; the latter are those that come properly under the name of enemies."

They insist, moreover, that the president himself, in his proclamation, admits that great numbers of the persons residing within the territories in possession of the insurgent government, are loyal in their feelings, and forced by compulsion and the violence of the rebellious and revolutionary party and its "*de facto* government" to submit to their laws and assist in their scheme of revolution; that the acts of the usurping government cannot legally sever the bond of their allegiance; they have, therefore, a co-relative right to claim the protection of the government for their persons and property, and to be treated as loyal citizens, till legally convicted of having renounced their allegiance and made war against the government by treasonably resisting its laws.

They contend, also, that the insurrection is the act of individuals and not of a government or sovereignty; that the individuals engaged are subjects of law. That confiscation of their property can be effected only under a municipal law. That by the law of the land such confiscation cannot take place without the conviction of the owner of some offense, and finally that the secession ordinances are nullities and ineffectual to release any citizen from his allegiance to the national government, and consequently that the constitution and laws of the United States are still operative over persons in all the States for punishment as well as protection.

This argument rests on the assumption of two propositions, \* each of which is without foundation on the established law of nations. It assumes that where a civil war exists, the party belligerent claiming to be sovereign, cannot, for some unknown reason, exercise the rights of belligerents, although the revolutionary party may. Being sovereign, he can exercise only sovereign rights over the other party. The insurgent may be killed on the battle-field or by the executioner; his property on land may be confiscated under the municipal law; but the commerce on the ocean, which supplies the rebels with means to support the war, cannot be made the subject of capture under the laws of war, because it is "*unconstitutional!!!*" Now, it is a proposition never doubted, that the belligerent party who claims to be sovereign, may exercise both belligerent and sovereign rights, (see 4 Cr. 272.) Treating the other party as a belligerent, and using only the milder modes of coercion which the law of nations has introduced to mitigate the rigors of war, cannot be a subject of complaint by the party to whom it is accorded as a grace or granted as a necessity. We have shown that a civil war such as that

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now waged between the northern and southern States is properly conducted according to the humane regulations of public law as regards capture on the ocean.

Under the very peculiar constitution of this government, although the citizens owe supreme allegiance to the federal government, they owe also a qualified allegiance to the State in which they are domiciled. Their persons and property are subject to its laws.

Hence, in organizing this rebellion, they have *acted as States* claiming to be sovereign over all persons and property within their respective limits, and asserting a right to absolve their citizens from their allegiance to the federal government. Several of these States have combined to form a new confederacy, claiming to be acknowledged by the world as a sovereign State. Their right to do so is now being decided by wager of battle. The ports and territory of each of these States are held in hostility to the general government. It is no loose, unorganized insurrection, having no defined boundary or possession. It has \*a [\* 674] boundary marked by lines of bayonets, and which can be crossed only by force—south of this line is enemies' territory, because it is claimed and held in possession by an organized, hostile, and belligerent power.

All persons residing within this territory whose property may be used to increase the revenues of the hostile power are, in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their government, and are none the less enemies because they are traitors.

But in defining the meaning of the term "enemies' property," we will be led into error if we refer to Fleta and Lord Coke for their definition of the word "enemy." It is a technical phrase peculiar to prize courts, and depends upon principles of public policy as distinguished from the common law.

Whether property be liable to capture as "enemies' property" does not in any manner depend on the personal allegiance of the owner. "It is the illegal traffic that stamps it as 'enemies' property.' It is of no consequence whether it belongs to an ally or a citizen. (8 Cr. 384.) The owner, *pro hac vice*, is an enemy." (3 Wash. C. C. R. 183.)

The produce of the soil of the hostile territory, as well as other property engaged in the commerce of the hostile power, as the source of its wealth and strength, are always regarded as legitimate prize, without regard to the domicile of the owner, and much more so if he reside and trade within their territory.

III. We now proceed to notice the facts peculiar to the several

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cases submitted for our consideration. The principles which have just been stated apply alike to all of them.

I. The case of the brig Amy Warwick.

This vessel was captured upon the high seas by the United States gunboat Quaker City, and with her cargo was sent into the district of Massachusetts for condemnation. The brig was claimed by David Currie and others. The cargo consisted of coffee, and was claimed, four hundred bags by Edmund Davenport & Co., and four thousand seven hundred bags by Dunlap, Moncure & Co. [\* 675] The title of these parties as respectively claimed \* was conceded. All the claimants at the time of the capture, and for a long time before, were residents of Richmond, Va., and were engaged in business there. Consequently, their property was justly condemned as "enemies' property."

The claim of Phipps & Co. for their advance was allowed by the court below. That part of the decree was not appealed from and is not before us. The case presents no question but that of enemies' property.

The decree below is affirmed with costs.

II. The case of the Hiawatha.

The court below in decreeing against the claimants proceeded upon the ground that the cargo was shipped after notice of the blockade.

The fact is clearly established, and if there were no qualifying circumstances, would well warrant the decree. But after a careful examination of the correspondence of the state and navy departments, found in the record, we are not satisfied that the British minister erred in the construction he put upon it, which was that a license was given to all vessels in the blockaded ports to depart with their cargoes within fifteen days after the blockade was established, whether the cargoes were taken on board before or after the notice of the blockade. All reasonable doubts should be resolved in favor of the claimants. Any other course would be inconsistent with the right administration of the law and the character of a just government. But the record discloses another ground upon which the decree must be sustained. On the 19th of April the president issued a proclamation announcing his intention to blockade the ports of the several States therein named.

On the 27th of April he issued a further proclamation announcing his intention to blockade the ports of Virginia and North Carolina in addition to those of the States named in the previous one. On the 30th of April Commodore Pendergrast issued his proclamation announcing the blockade as established. These proclamations

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were communicated to the British minister as soon as they were issued. On the 5th of May the British consul at Richmond wrote to Lord Lyons that he had advised \*those represent- [ \* 676 ] ing the owners of the *Hiawatha* that there would be no difficulty in her leaving in ballast. He added, "*but to this they will not consent.*" On the 8th of May Lord Lyons made an application to the secretary of state relative to this vessel. The matter was referred to the navy department. On the same day the secretary of the navy replied: Fifteen days have been specified as a limit for neutrals to leave the ports *after actual blockade has commenced*, with or without cargo, and there are yet five or six days for neutrals to leave: with proper diligence on the part of persons interested *I see no reason for exemption to any.*" Here was a distinct warning that the vessel must leave within the time limited, *after the commencement of the blockade.* On the 10th of May she completed the discharge of her cargo.

On the next day she commenced lading for her outer voyage, and by working night and day, on the 15th of May she had taken in a full cargo of cotton and tobacco. On that day the British consul gave her a certificate, wherein he referred to the proclamation of the 27th of April, "in which it was announced that a blockade would be enforced of the ports of Virginia," and added, that "the best information attainable" "pointed to the 2d of May as the day when an efficient blockade was supposed to have been established."

On the 16th of May she was ready for sea, but there was no steam-tug in port to tow her down the river. At six o'clock p. m. on the 17th she was taken in tow by the steam-tug *David Currie*. The tug had not sufficient power and the *Hiawatha* came to anchor again. On the 18th at six o'clock a. m. she was taken in tow by the steam-tug *William Allison* and towed out to sea. On the 20th of May she was captured in Hampton Roads off Fortress Monroe, and taken with her cargo into the southern district of New York for condemnation.

The energy with which the labor of lading her was pressed evinces the consciousness of those concerned of the peril of delay beyond the time limited by the proclamation for her departure. The time was fifteen days *from the establishment of the blockade.* The blockade was effectual on the 30th of April.

There is no controversy upon the subject. The fifteen days \*expired on the 15th of May—the day she completed [ \* 677 ] her lading. A vessel being in a blockaded port is presumed to have notice of the blockade as soon as it commences. This is a settled rule in the law of nations.

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The certificate of the consul states, that according to his information the blockade commenced on the 2d of May. It is not easy to imagine how he could have arrived at this conclusion. The James river is a great commercial thoroughfare. It would seem that news of so important an event must have swept up its waters to Richmond, as news of interest spreads along the streets of a city. Such circumstances must have immediately become known to the parties as were sufficient to put them upon inquiry, and were, therefore, equivalent to full notice. But, conceding the 2d of May to be the day from which the computation is to be made, then, the fifteen days expired on the 17th of May. Her voyage down the river was not effectively begun until the 18th of May. This was after the expiration of the time allowed. In either view she became delinquent, and was guilty of a breach of the blockade. The proclamation allowed fifteen days—not fifteen days, *and until a steam-tug could be procured*. The difficulty of procuring a tug was one of the accidents which must have been foreseen and should have been provided for. Those concerned, notwithstanding the warning they received, in their eagerness to realize the profits of a full cargo, took the hazards of the adventure and must now bear the consequences. If she could overstay the time limited for a short period she could for a long one. Whatever the excess of time, the principle involved is the same.

It is insisted for the claimants that according to the President's proclamation on the 19th of April, the *Hiawatha* was not liable to capture, until "the commander of one of the blockading vessels" had "duly warned" her, endorsed "on her register the date and fact of such warning," and she had again attempted "to leave the blockaded port." To this proposition there are several answers:

- 1st. There is no such provision in the proclamation of the 27th of April touching *the ports of Virginia*.  
[\* 678] \* It simply announces that a blockade of those ports would be established.

- 2d. The proclamation of Commodore Pendergrast limits the warning to those who should approach the line of the blockade in ignorance of its existence. This action of the naval commander has not been disavowed by his government, and is conclusive in a prize court. The warning proposed by this proclamation is according to the law of nations, and it is all that the law requires.

- 3d. If the provision referred to in the proclamation of the 19th of April be applicable to the ports of Virginia, it must be considered in the light of the surrounding circumstances.

It was intended for the benefit of the innocent, not of the guilty.

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It would be absurd to warn parties who had full previous knowledge. According to the construction contended for, a vessel seeking to evade the blockade might approach and retreat any number of times, and when caught her captors could do nothing but warn her and endorse the warning upon her registry. The same process might be repeated at every port on the blockaded coast. Indeed, according to the literal terms of the proclamation, the Alabama might approach, and if captured, insist upon the warning and endorsement of her registry, and then upon her discharge. A construction drawing after it consequences so absurd, is a "*felo de se*."

The cargo must share the fate of the vessel.

The decree below is affirmed with costs.

III. The case of the *Brillante*, No. 134, presents but little difficulty. This was a Mexican vessel, with a cargo belonging to Mexican citizens, seized on the 23d of June, 1861, in Biloxi Bay, in an attempt to escape from New Orleans by running the blockade, which had been established there by an efficient force on the 15th of May preceding. She was carried by the captors to Key West, where she was libeled in the district court of the United States for the southern district of Florida, and condemned with her cargo as prize of war.

From the deposition of Don Rafael Preciat, who was part owner of the vessel and partner in the ownership of her cargo, \* and also was on board from the time she left her home [ \* 679 ] port at Campeche until her capture, the following facts may be gathered :

In approaching New Orleans with a cargo from Sisal, she found the United States ship-of-war *Brooklyn* blockading the mouth of the Mississippi river at Pass a Loutre, and was by the officer of that vessel informed of the blockade and forbid to enter. The witness had a son at Spring Hill College, near Mobile, whom he desired to get away ; and the commander of the *Brooklyn* gave him a letter to the commander of the *Niagara*, recommending that he should be permitted to land and get his son. On leaving the *Brooklyn* she started along the coast in the direction of the *Niagara*, but instead of seeking that vessel, she evaded her, and went to New Orleans by way of Lake Ponchartrain. At New Orleans she discharged her cargo and took in another, and in attempting to escape by the way she intended, was captured as already stated.

Some attempt has been made to excuse her entrance to New Orleans by showing that the crew refused to proceed towards Mobile ; but this is immaterial, as her condemnation is not for her successful entrance, but for her unsuccessful attempt to escape.

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It is also urged that she was entitled to warning at the time of her capture, by virtue of the provision in the president's proclamation establishing the blockade. But whatever may be the sound construction of that provision in reference to warning vessels in its application to vessels which had notice of the blockade, the question does not arise in this case; because, from the statement of the owner of the vessel himself, she was warned by the officer of the Brooklyn.

The fact that the vessel's register was not produced by either party to show a warning indorsed on it, can make no difference. It cannot be supposed that such indorsement on the ship's register is to be the only evidence of warning; for if this were admitted, the vessel would only have to destroy her register, and with it the only evidence in which she could be condemned, or she would only need to keep several registers and destroy the one having the indorsement.

We entertain no doubt that this vessel and cargo were [ \* 680 ] justly \*condemned as neutral property for running the blockade, of which she had been fairly warned, and which she had once successfully violated.

The judgment is therefore affirmed.

The case of the *Crenshaw*, No. 163, on the other hand, presents the question of "enemies' property," pure and simple. This vessel was seized in Hampton Roads on the 17th of May, 1861, by the blockading force at that point under flag-officer Stringham, and was carried as a prize of war into New York. The vessel and the larger part of the cargo were, at the time of the capture, owned by citizens of the State of Virginia, residing in Richmond; and the vessel had on board, among her papers, a clearance signed on the 14th of May by R. H. Lortin, collector of the port of Richmond, of the Confederate States of America.

Upon the principles already settled, the vessel and such parts of her cargo as came within the description of enemies' property, were rightfully condemned. It is, however, claimed that ten tierces of tobacco strips shipped by Ludlam & Watson at Richmond, to be delivered to shipper's order at Liverpool, and thirty tierces of tobacco strips shipped by W. O. Clark at Richmond, to order of Messrs. Sam'l Irven or assigns, Liverpool, are not enemies' property, and should be restored to claimants.

The claim for the ten tierces, as interposed by Henry Ludlam in behalf of himself and others, and the statement of the claimant's petition, are sworn to by Gustave Henikin, who holds the bill of lading, which is indorsed—"deliver to Ludlam & Henekin, for Chas. Lear & Sons', Liverpool. Ludlam & Watson."

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Mr. Henikin states that his partner, Henry Ludlam, was in Europe, that Watson, (the partner of Ludlam & Watson, resident in Richmond,) was out of the jurisdiction of the court, and that his knowledge of the facts embraced in the petition is derived from his connections with it as partner of Ludlam, and from correspondence and business relations with the shippers. The extent of his knowledge thus set forth is not very satisfactory, nor is the claim stated in a manner to relieve it of any embarrassment growing out of this fact. He sets forth substantially that Ludlam & Watson, the shippers, was a firm composed of \*Henry Ludlam, a [\* 681] citizen and resident of Rhode Island, and G. F. Watson, a citizen and resident of Richmond, Va., doing business in Richmond; and that Henry Ludlam was also doing business in New York in partnership with Gustave Henikin, under the style of Ludlam & Henikin, and that Lear & Sons were a mercantile partnership, composed of British subjects, residing in Liverpool. Then, speaking in behalf of all these parties, the petitioner says, they are owners of the ten tierces of tobacco, and *bona fide* owners of the bill of lading for the same, and that said tobacco was from the time of the shipment on board of the Crenshaw in the port of Richmond, and still is the property of the claimants.

It will be seen at once, that the statement does not profess to set out what are the distinct interests of each individual in this property, nor the separate interests of the three partnership firms thus claiming it. Nor is there any attempt to show how any person beside Ludlam & Watson of Richmond, who were the shippers, acquired any interest in it. It is a joint claim on the part of all the persons mentioned, all of whom are asserted to be *bona fide* holders of the bill of lading. It is perfectly consistent with all that was stated, that Ludlam & Watson were the real owners of the property. The bill of lading, which is to shipper's order or assigns, throws no light on the subject, and there is not a particle of other testimony in reference to the claim in the record. The court decreed that the interest of Lear & Sons in the ten tierces of tobacco be restored to them and that they pay costs, unless they furnished further proof that the property was *bona fide* neutral. They failed to furnish better proof and appealed on account of the costs.

We are of the opinion that the decree does them no injustice, and in the doubtful circumstances in which this claim stands, on their own statement, should have had great hesitation in giving them the property if the captors had appealed.

In reference to the claim of Ludlam, we are not sufficiently advised of what it is by his pleading or by the proof, to set apart for

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him, if it were just. But we are of the opinion that the firm of Ludlam & Watson, doing business in Richmond, where [ \* 682 ] \* Watson, the active member of the firm, resided, must be ruled by his status in reference to the property of the firm under his control in the enemy country.

The property was, through his residence in that country, subjected to the power of the enemy, and comes within the category of "enemies' property."

There is more difficulty in reference to the claim of Irvin & Co., to the thirty tierces of tobacco strips.

It very clearly appears that Irvin & Co., claimants, purchased this tobacco before the war broke out, with their own means, which were then in Richmond, and that they are citizens and residents of New York.

It is claimed that the property should be condemned on the ground that the transaction constitutes an illegal traffic with the enemy. This certainly cannot be held to apply to the purchase of the tobacco, which was bought and paid for before hostilities commenced. If it is intended to apply the principle of illegal traffic to the attempt to withdraw the property from the enemy country, it would seem that the order of the secretary of the navy allowing fifteen days for all vessels to withdraw from the blockaded ports, with or without cargo, should be held to apply to the property of one of our own citizens, residing in New York, already bought and paid for, as well as to any neutral cargo. If this be correct, it would seem that the property of Irvin & Co. should be restored to them as that of Laurie, Son & Co. was.

The right of Scott & Clark to commissions on profits really constituted no interest in the property, and presents no cognizable feature in the case.

This property will therefore be restored to the claimants.

Mr. Justice NELSON, dissenting. The property in this case, vessel and cargo, was seized by a government vessel on the 20th of May, 1861, in Hampton Roads, for an alleged violation of the blockade of the ports of the State of Virginia. The *Hiawatha* was a British vessel, and the cargo belonged to British subjects. The vessel had entered the James river before the blockade, on [ \* 683 ] \* her way to City Point, upwards of one hundred miles from the mouth, where she took in her cargo. She finished loading on the 15th of May, but was delayed from departing on her outward voyage till the 17th, for want of a tug to tow her down the river. She arrived at Hampton Roads on the 20th, where,

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the blockade in the meantime having been established, she was met by one of the ships, and the boarding officer indorsed on her register, "ordered not to enter any port in Virginia, or south of it." This occurred some three miles above the place where the flag ship was stationed, and the boarding officer directed the master to heave his ship to when he came abreast of the flag ship, which was done, when she was taken in charge as prize.

On the 30th April, flag officer Pendergrast, U. S. ship Cumberland, off Fortress Monroe, in Hampton Roads, gave the following notice: "All vessels passing the capes of Virginia, coming from a distance, and ignorant of the proclamation, (the proclamation of the president of the 27th of April that a blockade would be established,) will be warned off; and those passing Fortress Monroe will be required to anchor under the guns of the fort and subject themselves to an examination."

The Hiawatha, while engaged in putting on board her cargo at City Point, became the subject of correspondence between the British minister and the secretary of state, under date of the 8th and 9th of May, which drew from the secretary of the navy a letter of the 9th, in which, after referring to the above notice of the flag officer Pendergrast, and stating that it had been sent to the Baltimore and Norfolk papers, and by one or more published, advised the minister that fifteen days had been fixed as a limit for neutrals to leave the ports after an actual blockade had commenced, with or without cargo. The inquiry of the British minister had referred not only to the time that a vessel would be allowed to depart, but whether it might be laden within the time. This vessel, according to the advice of the secretary, would be entitled to the whole of the 15th of May to leave City Point, her port of lading. As we have seen, her cargo was on board within the time, but the vessel was \*delayed in her departure for want of a tug to tow [\* 684] her down the river.

We think it very clear upon all the evidence that there was no intention on the part of the master to break the blockade, that the seizure under the circumstances was not warranted, and upon the merits that the ship and cargo should have been restored.

Another ground of objection to this seizure is, that the vessel was entitled to a warning indorsed on her papers by an officer of the blockading force, according to the terms of the proclamation of the president; and that she was not liable to capture except for the second attempt to leave the port.

The proclamation, after certain recitals, not material in this branch of the case, provides as follows: the president has "deemed

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it advisable to set on foot a blockade of the ports within the States aforesaid, (the States referred to in the recitals,) in pursuance of the laws of the United States and of the law of nations, in such case made and provided." "If, therefore, with a view to violate such blockade, a vessel shall approach or shall attempt to leave either of said ports, she will be duly warned by the commander of one of the blockading vessels, who will indorse on her register the fact and date of such warning, and if the same vessel shall attempt again to enter or leave the blockaded port, she will be captured and sent to the nearest convenient port for such proceedings against her and her cargo, as prize, as may be deemed advisable."

The proclamation of the president of the 27th of April extended that of the 19th to the States of Virginia and North Carolina.

It will be observed that this warning applies to vessels attempting to enter or leave the port, and is therefore applicable to the *Hiawatha*.

We must confess that we have not heard any satisfactory answer to the objection founded upon the terms of this proclamation.

It has been said that the proclamation, among other grounds, as stated on its face, is founded on the "law of nations," and [ \* 685 ] \*hence draws after it the law of blockade as found in that code, and that a warning is dispensed with in all cases where the vessel is chargeable with previous notice or knowledge that the port is blockaded. But the obvious answer to the suggestion is, that there is no necessary connection between the authority upon which the proclamation is issued and the terms prescribed as the condition of its penalties or enforcement, and, besides, if founded upon the laws of nations, surely it was competent for the president to mitigate the rigors of that code and apply to neutrals the more lenient and friendly principles of international law. We do not doubt but that considerations of this character influenced the president in prescribing these favorable terms in respect to neutrals; for, in his message a few months later to congress, (4th of July,) he observes: "a proclamation was issued for closing the ports of the insurrectionary districts" (not by blockade, but) "by proceedings *in the nature of a blockade*."

This view of the proclamation seems to have been entertained by the secretary of the navy, under whose orders it was carried into execution. In his report to the president, 4th July, he observes, after referring to the necessity of interdicting commerce at those ports where the government was not permitted to collect the revenue, that "in the performance of this domestic municipal duty the property and interests of foreigners became, to some extent, involved

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in our home questions, and with a view of extending to them every comity that circumstances would justify, the rules of blockade were adopted, and, as far as practicable, made applicable to the cases that occurred under this embargo or non-intercourse of the insurgent States. The commanders, he observes, were directed to permit the vessels of foreigners to depart within fifteen days as in case of actual effective blockade, and their vessels were not to be seized unless they attempted, after having been once warned off, to enter an interdicted port in disregard of such warning."

The question is not a new one in this court. The British government had notified the United States of the blockade of certain ports in the West Indies, but "not to consider blockades as existing, unless in respect to particular ports which may be \*actually invested, and then not to capture vessels bound [ \* 686 ] to such ports, unless they shall have been previously warned not to enter them."

The question arose upon this blockade in *Mar. In. Co. v. Woods*, (6 Cranch, 29.)

Chief Justice Marshall, in delivering the opinion of the court, observed: "The words of the order are not satisfied by any previous notice which the vessel may have obtained, otherwise than by her being warned off. This is a technical term which is well understood. It is not satisfied by notice received in any other manner. The effect of this order is, that a vessel cannot be placed in the situation of one having notice of the blockade until she is warned off. It gives her a right to inquire of the blockading squadron, if she shall not receive this warning from one capable of giving it, and consequently dispenses with her making that inquiry elsewhere. While this order was in force a neutral vessel might lawfully sail for a blockaded port, knowing it to be blockaded, and being found sailing towards such port, would not constitute an attempt to break the blockade until she would be warned off."

We are of opinion, therefore, that, according to the very terms of the proclamation, neutral ships were entitled to a warning by one of the blockading squadron, and could be lawfully seized only on the second attempt to enter or leave the port.

It is remarkable, also, that both the President and the secretary, in referring to the blockade, treat the measure, not as a blockade under the law of nations, but as a restraint upon commerce at the interdicted ports under the municipal laws of the government.

Another objection taken to the seizure of this vessel and cargo is, that there was no existing war between the United States and the States in insurrection within the meaning of the law of nations,

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which drew after it the consequences of a public or civil war. A contest by force between independent sovereign States is called a public war; and, when duly commenced by proclamation or otherwise, it entitles both of the belligerent parties to all the [\* 687] rights of war against each other, and as respects \* neutral nations. Chancellor Kent observes: "Though a solemn declaration, or previous notice to the enemy, be now laid aside, it is essential that some formal public act, proceeding directly from the competent source, should announce to the people at home their new relations and duties growing out of a state of war, and which should equally apprise neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things." "Such an official act operates from its date to legalize all hostile acts, in like manner as a treaty of peace operates from its date to annul them." He further observes, "as war cannot lawfully be commenced on the part of the United States without an act of congress, such act is, of course, a formal notice to all the world, and equivalent to the most solemn declaration."

The legal consequences resulting from a state of war between two countries at this day are well understood, and will be found described in every approved work on the subject of international law. The people of the two countries become immediately the enemies of each other—all intercourse, commercial or otherwise, between them unlawful—all contracts existing at the commencement of the war suspended, and all made during its existence utterly void. The insurance of enemies' property, the drawing of bills of exchange or purchase on the enemies' country, the remission of bills or money to it are illegal and void. Existing partnerships between citizens or subjects of the two countries are dissolved, and, in fine, interdiction of trade and intercourse, direct or indirect, is absolute and complete by the mere force and effect of war itself. All the property of the people of the two countries on land or sea are subject to capture and confiscation by the adverse party as enemies' property, with certain qualifications as it respects property on land, (*Brown v. United States*, 8 Cranch, 110,) all treaties between the belligerent parties are annulled. The ports of the respective countries may be blockaded, and letters of marque and reprisal granted as rights of war, and the law of prizes as defined by the law of nations comes into full and complete operation, resulting from maritime captures, *jure belli*. War also [\* 688] effects a change in the \* mutual relations of all States or countries, not directly, as in the case of the belligerents,



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but immediately and indirectly, though they take no part in the contest, but remain neutral.

This great and pervading change in the existing condition of a country, and in the relations of all her citizens or subjects, external and internal, from a state of peace, is the immediate effect and result of a state of war; and hence the same code which has annexed to the existence of a war all these disturbing consequences has declared that the right of making war belongs exclusively to the supreme or sovereign power of the State.

This power in all civilized nations is regulated by the fundamental laws or municipal constitution of the country.

By our constitution this power is lodged in congress. Congress shall have power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water."

We have thus far been considering the status of the citizens or subjects of a country at the breaking out of a public war when recognized or declared by the competent power.

In the case of a rebellion or resistance of a portion of the people of a country against the established government, there is no doubt, if in its progress and enlargement the government thus sought to be overthrown sees fit, it may by the competent power recognize or declare the existence of a state of civil war, which will draw after it all the consequences and rights of war between the contending parties as in the case of a public war. Mr. Wheaton observes, speaking of civil war, "But the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations." It is not to be denied, therefore, that if a civil war existed between that portion of the people in organized insurrection to overthrow this government at the time this vessel and cargo was seized, and if she was guilty of a violation of the blockade, she would be lawful prize of war. But before this insurrection against the established government can be dealt with on the footing of a civil war, within the meaning of the law of nations and the constitution \* of the United States, and which will draw after [\* 689] it belligerent rights, it must be recognized or declared by the war-making power of the government. No power short of this can change the legal status of the government or the relations of its citizens from that of peace to a state of war, or bring into existence all those duties and obligations of neutral third parties growing out of a state of war. The war power of the government must be exercised before this changed condition of the government and

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people and of neutral third parties can be admitted. There is no difference in this respect between a civil or a public war.

We have been more particular upon this branch of the case than would seem to be required, on account of any doubt or difficulties attending the subject in view of the approved works upon the law of nations or from the adjudication of the courts, but because some confusion existed on the argument as to the definition of a war that drew after it all the rights of prize of war. Indeed, a great portion of the argument proceeded upon the ground that these rights could be called into operation—enemies' property captured—blockades set on foot and all the rights of war enforced in prize courts—by a species of war unknown to the law of nations and to the constitution of the United States.

An idea seemed to be entertained that all that was necessary to constitute a war was organized hostility in the district of country in a state of rebellion—that conflicts on land and on sea—the taking of towns and capture of fleets—in fine, the magnitude and dimensions of the resistance against the government—constituted war with all the belligerent rights belonging to civil war. With a view to enforce this idea, we had, during the argument, an imposing historical detail of the several measures adopted by the confederate States to enable them to resist the authority of the general government, and of many bold and daring acts of resistance and of conflict. It was said that war was to be ascertained by looking at the armies and navies or public force of the contending parties, and the battles lost and won—that in the language of one of the learned

counsel, "Whenever the situation of opposing hostilities [ \* 690 ] has assumed the proportions \*and pursued the methods of war, then peace is driven out, the ordinary authority and administration of law are suspended, and war in fact and by necessity is the *status* of the nation until peace is restored and the laws resumed their dominion."

Now, in one sense, no doubt this is war, and may be a war of the most extensive and threatening dimensions and effects, but it is a statement simply of its existence in a material sense, and has no relevancy or weight when the question is what constitutes war in a legal sense, in the sense of the law of nations, and of the constitution of the United States. For it must be a war in this sense to attach to it all the consequences that belong to belligerent rights. Instead, therefore, of inquiring after armies and navies, and victories lost and won, or organized rebellion against the general government, the inquiry should be into the law of nations and into the municipal fundamental laws of the government. For we find

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there that to constitute a civil war in the sense in which we are speaking, before it can exist, in contemplation of law, it must be recognized or declared by the sovereign power of the State, and which sovereign power by our constitution is lodged in the congress of the United States—civil war, therefore, under our system of government, can exist only by an act of congress which requires the assent of two of the great departments of the government, the executive and legislative.

We have thus far been speaking of the war power under the constitution of the United States, and as known and recognized by the law of nations. But we are asked, what would become of the peace and integrity of the Union in case of an insurrection at home or invasion from abroad if this power could not be exercised by the president in the recess of congress, and until that body could be assembled?

The framers of the constitution fully comprehended this question, and provided for the contingency. Indeed, it would have been surprising if they had not, as a rebellion had occurred in the State of Massachusetts while the convention was in session, and which had become so general that it was quelled only by

\*calling upon the military power of the State. The con- [ \* 691 ] stitution declares that congress shall have power "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions." Another clause, "that the president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States when called into the actual service of the United States;" and again, "He shall take care that the laws shall be faithfully executed." Congress passed laws on this subject in 1792 and 1795. 1 United States Laws, pp. 264, 424.

The last act provided that whenever the United States shall be invaded or be in imminent danger of invasion from a foreign nation, it shall be lawful for the president to call forth such number of the militia most convenient to the place of danger, and in case of insurrection in any State against the government thereof, it shall be lawful for the president, on the application of the legislature of such State, if in session, or if not, of the executive of the State, to call forth such number of militia of any other State or States as he may judge sufficient to suppress such insurrection.

The 2d section provides, that when the laws of the United States shall be opposed, or the execution obstructed in any State by combinations too powerful to be suppressed by the course of judicial proceedings, it shall be lawful for the president to call forth the

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militia of such State, or of any other State or States as may be necessary to suppress such combinations ; and by the act 3 March, 1807, (2 U. S. Laws, 443,) it is provided that in case of insurrection or obstruction of the laws, either in the United States or of any State or territory, where it is lawful for the president to call forth the militia for the purpose of suppressing such insurrection, and causing the laws to be executed, it shall be lawful to employ for the same purpose such part of the land and naval forces of the United States as shall be judged necessary.

It will be seen, therefore, that ample provision has been made under the constitution and laws against any sudden and unexpected disturbance of the public peace from insurrection at home [ \* 692 ] \* or invasion from abroad. The whole military and naval power of the country is put under the control of the president to meet the emergency. He may call out a force in proportion to its necessities, one regiment or fifty, one ship-of-war or any number at his discretion. If, like the insurrection in the State of Pennsylvania in 1793, the disturbance is confined to a small district of country, a few regiments of the militia may be sufficient to suppress it. If of the dimension of the present, when it first broke out, a much larger force would be required. But whatever its numbers, whether great or small, that may be required, ample provision is here made ; and whether great or small, the nature of the power is the same. It is the exercise of a power under the municipal laws of the country and not under the law of nations ; and, as we see, furnishes the most ample means of repelling attacks from abroad or suppressing disturbances at home until the assembling of congress, who can, if it be deemed necessary, bring into operation the war power, and thus change the nature and character of the contest. Then, instead of being carried on under the municipal law of 1795, it would be under the law of nations, and the acts of congress as war measures with all the rights of war.

It has been argued that the authority conferred on the president by the act of 1795 invests him with the war power. But the obvious answer is, that it proceeds from a different clause in the constitution and which is given for different purposes and objects, namely, to execute the laws and preserve the public order and tranquillity of the country in a time of peace by preventing or suppressing any public disorder or disturbance by foreign or domestic enemies. Certainly, if there is any force in this argument, then we are in a state of war with all the rights of war, and all the penal consequences attending it, every time this power is exercised by calling out a military force to execute the laws or to suppress insurrection

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or rebellion ; for the nature of the power cannot depend upon the numbers called out. If so, what numbers will constitute war and what numbers will not? It has also been argued that this power of the president from necessity should be construed as vesting him with the war \* power, or the republic might [ \* 693 ] greatly suffer or be in danger from the attacks of the hostile party before the assembling of congress. But we have seen that the whole military and naval force are in his hands under the municipal laws of the country. He can meet the adversary upon land and water with all the forces of the government. The truth is, this idea of the existence of any necessity for clothing the president with the war power, under the act of 1795, is simply a monstrous exaggeration ; for, besides having the command of the whole of the army and navy, congress can be assembled within any thirty days, if the safety of the country requires that the war power shall be brought into operation.

The acts of 1795 and 1807 did not, and could not, under the constitution, confer on the President the power of declaring war against a State of this Union, or of deciding that war existed, and upon that ground authorize the capture and confiscation of the property of every citizen of the State whenever it was found in the waters. The laws of war, whether the war be civil or *inter gentes*, as we have seen, convert every citizen of the hostile State into a public enemy, and treat him accordingly, whatever may have been his previous conduct. This great power over the business and property of the citizen is reserved to the legislative department by the express words of the constitution. It cannot be delegated or surrendered to the executive. Congress alone can determine whether war exists or should be declared ; and until they have acted, no citizen of the State can be punished in his person or property, unless he has committed some offense against a law of congress passed before the act was committed which made it a crime, and defined the punishment. The penalty of confiscation for the acts of others with which he had no concern cannot lawfully be inflicted.

In the breaking out of a rebellion against the established government, the usage in all civilized countries, in its first stages, is to suppress it by confining the public forces and the operations of the government against those in rebellion, and at the same time extending encouragement and support to the loyal people with a view to their co-operation in putting down the \*in- [ \* 694 ] surgents. This course is not only the dictate of wisdom, but of justice. This was the practice of England in Monmouth's rebellion in the reign of James the Second, and in the rebellions of

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1715 and 1745, by the Pretender and his son, and also in the beginning of the rebellion of the Thirteen Colonies of 1776. It is a personal war against the individuals engaged in resisting the authority of the government. This was the character of the war of our Revolution till the passage of the act of the parliament of Great Britain of the 16th of George Third, 1776. By that act all trade and commerce with the Thirteen Colonies was interdicted, and all ships and cargoes belonging to the inhabitants subjected to forfeiture as if the same were the ships and effects of open enemies. From this time the war became a territorial civil war between the contending parties, with all the rights of war known to the law of nations. Down to this period the war was personal against the rebels, and encouragement and support constantly extended to the loyal subjects who adhered to their allegiance, and although the power to make war existed exclusively in the king, and of course this personal war carried on under his authority, and a partial exercise of the war power, no captures of the ships or cargo of the rebels as enemies' property on the sea, or confiscation in prize courts as rights of war, took place until after the passage of the act of parliament. Until the passage of the act the American subjects were not regarded as enemies in the sense of the law of nations. The distinction between the loyal and rebel subjects was constantly observed. That act provided for the capture and confiscation as prize of their property as if the same were the property "of open enemies." For the first time the distinction was obliterated.

So the war carried on by the president against the insurrectionary districts in the southern States, as in the case of the king of Great Britain in the American Revolution, was a personal war against those in rebellion, and with encouragement and support of loyal citizens with a view to their co-operation and aid in suppressing the insurgents, with this difference, as the war-making power belonged to the king, he might have recognized or declared [ \* 695 ] the war at the beginning to be a civil war \* which would draw after it all the rights of a belligerent, but in the case of the president no such power existed; the war therefore from necessity was a personal war, until congress assembled and acted upon this state of things.

Down to this period the only enemy recognized by the government was the persons engaged in the rebellion, all others were peaceful citizens, entitled to all the privileges of citizens under the constitution. Certainly it cannot rightfully be said that the president has the power to convert a loyal citizen into a belligerent enemy or confiscate his property as enemy's property.

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Congress assembled on the call for an extra session the 4th of July, 1861, and among the first acts passed was one in which the president was authorized by proclamation to interdict all trade and intercourse between all the inhabitants of States in insurrection and the rest of the United States, subjecting vessel and cargo to capture and condemnation as prize, and also to direct the capture of any ship or vessel belonging in whole or in part to any inhabitant of a State whose inhabitants are declared by the proclamation to be in a state of insurrection, found at sea or in any part of the rest of the United States. (Act of congress of 13th of July, 1861, secs. 5, 6.) The 4th section also authorized the president to close any port in a collection district obstructed so that the revenue could not be collected, and provided for the capture and condemnation of any vessel attempting to enter.

The president's proclamation was issued on the 16th of August following, and embraced Georgia, North and South Carolina, part of Virginia, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida.

This act of congress, we think, recognized a state of civil war between the government and the confederate States, and made it territorial. The act of parliament of 1776, which converted the rebellion of the colonies into a civil territorial war, resembles, in its leading features, the act to which we have referred. Government, in recognizing or declaring the existence of a civil war between itself and a portion of the people in insurrection, usually modifies its effects with a view as far as \*practi- [ \* 696 ] cable to favor the innocent and loyal citizens or subjects involved in the war. It is only the urgent necessities of the government, arising from the magnitude of the resistance, that can excuse the conversion of the personal into a territorial war, and thus confound all distinction between guilt and innocence; hence the modification in the act of parliament declaring the territorial war.

It is found in the 44th section of the act, which for the encouragement of well-affected persons, and to afford speedy protection to those desirous of returning to their allegiance, provided for declaring such inhabitants of any colony, county, town, port, or place, at peace with his majesty, and after such notice by proclamation there should be no further captures. The act of 13th of July provides that the president may, in his discretion, permit commercial intercourse with any such part of a State or section, the inhabitants of which are declared to be in a state of insurrection, (§ 5,) obviously intending to favor loyal citizens and encourage others to

## The Prize Cases.

return to their loyalty. And the 8th section provides that the secretary of the treasury may mitigate or remit the forfeitures and penalties incurred under the act. The act of 31st July is also one of a kindred character. That appropriates \$2,000,000 to be expended under the authority of the president in supplying and delivering arms and munitions of war to loyal citizens residing in any of the States of which the inhabitants are in rebellion, or in which it may be threatened. We agree, therefore, that the act 13th July, 1861, recognized a state of civil war between the government and the people of the States described in that proclamation.

The cases of *The United States v. Palmer*, (3 Wh. 610,) *Divina Pastora*, and 4 *Ibid*, 52, and that class of cases to be found in the reports, are referred to as furnishing authority for the exercise of the war power claimed for the president in the present case. These cases hold that when the government of the United States recognizes a state of civil war to exist between a foreign nation and her colonies, but remaining itself neutral, the courts are bound to consider as lawful all those acts which the new government [ \* 697 ] may direct against the enemy, and we \* admit the president who conducts the foreign relations of the government may fitly recognize or refuse to do so, the existence of civil war in the foreign nation under the circumstances stated.

But this is a very different question from the one before us, which is whether the president can recognize or declare a civil war, under the constitution, with all its belligerent rights, between his own government and a portion of its citizens in a state of insurrection. That power, as we have seen, belongs to congress. We agree when such a war is recognized or declared to exist by the war-making power, but not otherwise, it is the duty of the courts to follow the decision of the political power of the government.

The case of *Luther v. Borden et al.*, (7 How. 45,) which arose out of the attempt of an assumed new government in the State to overthrow the old and established government of Rhode Island by arms. The legislature of the old government had established martial law, and the chief justice in delivering the opinion of the court observed, among other things, that "if the government of Rhode Island deemed the armed opposition so formidable and so ramified throughout the State as to require the use of its military force, and the declaration of martial law, we see no ground upon which this court can question its authority. It was a state of war, and the established government resorted to the rights and usages of war to maintain itself and overcome the unlawful opposition."

But it is only necessary to say, that the term "war" must ne-



## The Prize Cases.

cessarily have been used here by the chief justice in its popular sense, and not as known to the law of nations, as the State of Rhode Island confessedly possessed no power under the federal constitution to declare war.

Congress on the 6th of August, 1862, passed an act confirming all acts, proclamations, and orders of the president, after the 4th of March, 1861, respecting the army and navy, and legalizing them, so far as was competent for that body, and it has been suggested, but scarcely argued, that this legislation on the subject had the effect to bring into existence an *ex post facto* civil war with all the rights of capture and confiscation, *jure \* belli* from [ \* 698 ] the date referred to. An *ex post facto* law is defined, when, after an action, indifferent in itself, or lawful, is committed, the legislature then, for the first time, declares it to have been a crime, and inflicts punishment upon the person who committed it. The principle is sought to be applied in this case. Property of the citizen or foreign subject engaged in lawful trade at the time, and illegally captured, which must be taken as true if a confirmatory act be necessary, may be held and confiscated by subsequent legislation. In other words trade and commerce authorized at the time by acts of congress and treaties, may, by *ex post facto* legislation, be changed into illicit trade and commerce with all its penalties and forfeitures annexed and enforced. The instance of the seizure of the Dutch ships in 1803 by Great Britain before the war, and confiscation after the declaration of war, which is well known, is referred to as an authority. But there the ships were seized by the war power, the orders of the government, the seizure being a partial exercise of that power, and which was soon after exercised in full.

The precedent is one which has not received the approbation of jurists, and is not to be followed. See W. B. Lawrence, 2d ed. Wheaton's Elements of Int. Law, pt. 4, ch. 1, sec. 11, and note. But, admitting its full weight, it affords no authority in the present case. Here the captures were without any constitutional authority, and void; and, on principle, no subsequent ratification could make them valid.

Upon the whole, after the most careful consideration of this case, which the pressure of other duties has admitted, I am compelled to the conclusion that no civil war existed between this government and the States in insurrection till recognized by the acts of congress 13th of July, 1861; that the president does not possess the power under the constitution to declare war or recognize its existence within the meaning of the law of nations, which carries with it bellig-

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Appleton v. Bacon & North.

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erent rights, and thus change the country and all its citizens from a state of peace to a state of war; that this power belongs exclusively to the congress of the United States, and, consequently, that the president had no power to set on foot a blockade under [ \* 699 ] the law of nations, and \* that the capture of the vessel and cargo in this case, and in all cases before the 13th of July, 1851, for breach of blockade, or as enemies' property, are illegal and void, and that the decrees of condemnation should be reversed and the vessel and cargo restored.

Mr. Chief Justice TANEY, Mr. Justice CATRON and Mr. Justice CLIFFORD concurred in the dissenting opinion of Mr. Justice NELSON.

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APPLETON, Appellant, v. BACON & NORTH.

2 Black, 699.

PATENT LAW.

1. A contract by one with an inventor, engaging his services and ingenuity in perfecting a machine for his benefit, gives him no claim to an improvement made after the expiration of that contract.
2. And when, by some mistake or irregularity, the patent which was applied for by the inventor for this improvement has been issued to his former employer, the patent must be surrendered and canceled.

CROSS-APPEALS from the circuit court for the District of Columbia. The case is well stated in the opinion.

*Mr. Carlisle and Mr. Webb*, for Appleton.

*Mr. Bradley and Mr. McCalla*, for Bacon & North.

[ \* 700 ] \* Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from the circuit court of the United States for the District of Columbia.

The bill was filed by the plaintiffs against the defendant, Bacon, to compel him to surrender and cancel letters patent for a new and useful machine for folding paper, granted 10th of August, 1858. Both parties set up a claim to the invention as assignees of John North, the inventor. The assignments to the plaintiffs were made under the dates of 12th of August, 1858, and 7th July, [ \* 701 ] 1859. The defendant claims under an agreement \* made between North and the American Book and Paper Folding Company, dated 6th of February, 1854, and between the same company and Newell and John North, 2d of May, 1854, and by a

subsequent verbal agreement between the defendant and John North some time in May, 1856.

According to the terms of the two written agreements between North and the American Company, the former stipulated to engage in the service of the company, and devote himself to the making of improvements in paper-folding machines for a compensation mentioned; and, further, that all improvements and inventions made or discovered should be the property of the company; and that he would take all proper steps for the purpose of procuring patents for said improvements. It was further stipulated that this agreement may be terminated by North on giving three months' notice after having served one year, and the company at any time on giving thirty days' notice.

This company, having subsequently resolved to close their business, gave a written notice to North on the 30th of May, 1857, that his services would be no longer required. And, about the same time, sold, at auction, among other things, their interest in the improvements made by North in paper-folding machines, including a patent issued 15th of April, 1856, to North, and another issued to E. N. Smith, 27th of November, 1849, and reissued 7th of January, 1851, which interests and property were purchased by one Anson Hardy. And, on the 1st of July, 1856, said Hardy assigned all his interest in the property to Bacon, the defendant.

The defendant, after his purchase of these machines, made a verbal arrangement with North to enter into his service and devote himself to making improvements in folding-machines upon the same terms and conditions as those under which he had been previously engaged with the company. This arrangement continued till about the middle of July, 1857, when he left the service of the defendant and engaged in the manufacture of sewing machines. Now, it is claimed, by the defendant, that the inventions or improvements embraced in the paper-folding machine in question were the fruits of the labors of North while \*en- [ \* 702 ] gaged in his, the defendant's, service, and when he was entitled to the benefit of his discoveries, or when he (North) was engaged in the service of the American Paper-Folding Company, who were entitled to the benefit of these discoveries, and which passed to him, the defendant, by assignment. The right, as thus derived, constitutes the title of the defendant to the invention and patent in controversy.

It has already been stated, that, among the property which passed to the defendant from the American Company through Hardy, was the patent to North for a paper-folding machine issued 15th of

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Appleton v. Bacon & North.

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April, 1856. The labors of North, while in the service of the defendant, were devoted to improvements upon this machine, and it is this machine as improved in July, 1857, when North left the service of the defendant, that it is claimed embodied the invention and improvements in question, and for which a patent was issued to the defendant 10th of August, 1858. The circumstances under which this patent was issued will be stated hereafter. For the present, our inquiry is, whether or not North made these discoveries while engaged in the service of the defendant, or in the service of the American Folding Company.

North, who was made a defendant and a party on the record, was called as a witness on the part of the plaintiffs, and very fully examined on both sides. No objection is taken to the competency of his testimony before the officer taking it, nor in the brief in this court, and we must regard it, therefore, as admitted by consent. This witness, after giving a history of the machine, of its exhibition at the fair of the American Institute in the fall of 1856, and also at Appleton's bindery, in Franklin street, in the city of New York, in February, 1857, and of some improvements made upon it at that place, states that about the first of June, 1857, he removed the machine to a shop in Middletown, Connecticut, and worked upon it there some six weeks endeavoring to improve it, but with no good results; gave up the effort and went into other business—making sewing machines. This was about the middle of July, 1857.

The difficulties in the working of the machine while at [ \*703 ] Appleton's, \* and at Middletown, were in the adjustment to correspond with the different signatures—the register, also, was imperfect—and a fullness in the sheet which wrinkled it.

This machine was afterwards removed to Colt's armory in Hartford, Connecticut; and we have the testimony of E. K. Root—a witness for the defendant, and mechanical engineer—who examined it there, and saw it in operation. He was asked—"Of the sheets you have seen folded on that machine, what proportion were crimped or wrinkled, and to what amount?" Answer: "My impression is that about one-half were wrinkled more or less—pretty much all on one side of the machine—so much as to be objectionable." "To what extent, if at all, would you consider the amount of wrinkling you observed as affecting of itself the practical value of the machine?" Answer: "I should say it would prevent its use on all good book work."

This testimony is confirmed by two other witnesses, Gavet and Mathews.

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De Kraft v. Barney.

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The machine to which these witnesses refer and speak of embodied all the improvements ever made upon it by North. Indeed, it is admitted he made none after the middle of July, 1857, and it is quite clear from the evidence that it was an unsuccessful experiment as a practical folding machine, and abandoned by him as such.

In the spring of 1858, North, at the solicitation of Mathews, who had charge of the bindery department of the Appletons, turned his attention to the invention of a machine that would fold the size of duodecimo sheets, all the previous machines that had been constructed having been adapted only to the folding of octavo volumes. As five-sixths of the business of book folding was of the small size, the invention was regarded as a great desideratum. This is the machine afterwards produced by North, and for which he applied to the patent office for a patent. The necessary papers, model, and certificate of payment of the patent fee were forwarded to the office 27th of May, 1858. The machine will fold books of both octavo and twelve-mo size with entire success.

The papers and model were filed in the patent office 10th \* June, 1858, and the patent issued to S. T. Bacon, the [ \* 704 ] defendant, instead of to John North, the inventor, on the 10th of August following, and this without any previous notice to him. How this happened in the commissioner's office has not been explained. It was a very grave irregularity. The specification on file was in the name of North, the application in his name, and the patent fee paid by him. We have seen the defendant, to whom it was issued, had no right to it, legal or equitable. The officer must have been imposed upon by the use of the old machine of 1856, which we have seen was but an unsuccessful experiment, and abandoned. The plaintiffs, as assignees of North, have made out a clear right to the patent, and the decree of the court below must be reversed and the cause remitted, with instructions to enter a decree for the plaintiffs, directing the defendant to surrender the patent to be canceled.

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DE KRAFFT, Appellant, v. BARNEY.

2 Black, 704.

JURISDICTION OF THIS COURT AS TO SUM IN CONTROVERSY.

A claim to the guardianship of children *in personam*, without any right to control property, is not capable of a moneyed valuation, and under the principle established in *Barry v. Mercein*, 5 How. 103, (16 Curtis, 327,) a judgment of an inferior court in that matter cannot be reversed here.

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De Krafft v. Barney.

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APPEAL from the circuit court for the District of Columbia. The facts necessary to understand the decision are stated in the opinion.

The case was heard on a motion to dismiss for want of jurisdiction.

*Mr. Davidge and Mr. Sayle*, for the motion.

*Mr. Cox and Mr. Blunt*, *per contra*.

[ \* 714 ] \* Mr. Chief Justice TANEY delivered the opinion of the court.

This case cannot be distinguished from the case of *Barry v. Mercein*, (5 How. 103.) The controversy in that case was between a husband and his divorced wife, respecting the guardianship of a child of the marriage who was still an infant.

They were living apart, and each of them claimed the right to the guardianship. And after full argument, the court held that in order to give this court jurisdiction under the 22d section of the judiciary act of 1789, the matter in dispute must be money, or some right, the value of which could be calculated and ascertained in money. And as the matter in controversy between the parties was not money, nor a right which could be measured by money, but was a contest between the father and mother of the infant upon other considerations, the appeal was dismissed for want of jurisdiction.

In the case before the court, it is admitted that De Krafft, the appellant, has no pecuniary interest in the controversy. He appears as *prochein ami* for the children of Barney, whose wife is dead, and from whom the children inherited a large property. De Krafft alleges that Barney, from his character and habits, is unfit to be trusted with the guardianship of the persons or property of his children, and prays that some other persons suitable and trustworthy may be appointed by the orphan's court. The guardianship of the persons and property of the children is, therefore, the only matter in dispute, not on account of any pecuniary value attached to the office, but upon other considerations. The case is the same in principle with that of *Barry v. Mercein*, above referred to, and the appeal to this court, for the same reason, must be dismissed for want of jurisdiction.

JACOB KOEHLER, and others Appellants, v. THE BLACK RIVER FALLS  
IRON COMPANY.

2 Black, 715.

CORPORATION ACTS—MORTGAGE WITHOUT SEAL—FRAUD OF DIRECTORS.

1. If the seal of a corporation was affixed to an instrument requiring its seal as a mortgage, without proper authority, but surreptitiously, then the deed is not the deed of the corporation, and it is not a legal and valid mortgage. It must have been affixed by some one duly authorized.
2. When it is proved affirmatively that neither the president nor secretary of the company, who are the rightful custodians of the seal, had any knowledge of the seal being affixed, the burden of proof to show its rightful use is on the holder of the mortgage.
3. The laws of Wisconsin require a deed to have a seal to make it valid as a conveyance of real estate.
4. A decree cannot be rendered foreclosing such an instrument as an *equitable* mortgage on a bill which sets the instrument out as a valid legal mortgage.
5. Under an order made by the stockholders, authorizing the directors to borrow money for the general use of the corporation, a few of the directors got together, without notice to the president or secretary, and made a mortgage to secure existing indebtedness of those directors; such a mortgage held to be a fraud upon the corporation, and in violation of the trust conferred on the directors, and, therefore, void.

APPEAL from the district court for the district of Wisconsin. The case is very well stated in the opinion.

*Mr. Carlisle*, for appellant.

*Mr. Doolittle*, for appellee.

Mr. Justice DAVIS delivered the opinion of the court.

This was a bill in chancery, brought in the district court of Wisconsin by Jacob Koehler, Daniel Koehler, and Harry Pfiffner against the "Black River Falls Iron Company," to foreclose a mortgage.

\*The bill alleges that, on the 13th of August, 1858, at [\*716] La Crosse, in Wisconsin, the "Black River Falls Iron Company"—a corporation created by the laws of Wisconsin—executed and delivered their promissory note to Daniel Koehler and Caspar Bircher for \$15,000, payable in nine months, to secure which a mortgage of even date, under the corporate seal, was also executed and delivered, which mortgage was witnessed, acknowledged, and recorded; that on the 21st day of September, 1858, Caspar Bircher, by an instrument of writing under seal, for the consideration of \$7,000, transferred to Jacob Koehler and Harry Pfiffner his interest in said note and mortgage, which was also acknowledged, and recorded; and that the note and

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being over due and unpaid, the aid of the court is asked to decree a foreclosure.

William M. Hubby, having filed his petition stating that he was a stockholder, and that in his opinion the directors did not intend to make defense, was allowed to appear and defend. Leave was given to the complainants to amend their bill so as to make Julius W. Haas and others, junior mortgagees, party defendants. Answers and replications were filed, proofs taken, and the cause was heard at the October term, 1860. The court dismissed the bill without prejudice and the complainants appealed.

The answers deny that the "Black River Falls Iron Company" ever executed under its corporate seal this mortgage, which denial, if sustained by the evidence, is decisive of this case. If the seal of the corporation was not affixed to the instrument by proper authority, but was surreptitiously obtained, then the deed is not the deed of the corporation, was not duly executed as the bill charges, and is not a legal mortgage, and cannot be foreclosed as such.

The mere fact that a deed has the corporate seal attached, does not make it the act of the corporation, unless the seal was placed to it by some one duly authorized. *Jackson v. Campbell*, (5 Wend. 572;) *Damon v. Granby*, (2 Pick. 345, 353;) *Bank of Ireland v. Evan*, (32 Eng. L. & E. 23;) *Angell and Ames on Corporations*, sec. 223.

[\*717] \*This mortgage had the corporate seal attached, and the presumption was that it was there rightfully, and the court properly admitted it to be read in evidence; but the presumption thus raised was not conclusive, and parol evidence was admissible to overthrow it. *St. Mary's Church*, (7 Serg. & R. 530;) *Berks & Dauphin Turnpike v. Myers*, (6 Serg. & R. 16.)

The evidence is conclusive that the corporate seal was affixed to the mortgage wrongfully.

The mortgage purports to have been executed on the 13th of August, 1838, and signed by Charles Hauser, president, and J. M. Levy, secretary *pro tem.*, who both swear that the corporate seal was not present, that they did not then, nor did they ever place the seal to the instrument, and have no knowledge how it came to be sealed. It was recorded shortly after being given, and no seal was to it.

Henry Richter, the secretary of the company, was the custodian of the seal, and testifies that he was not present when the mortgage was given, that he had the seal in his possession, and did not then, or at any time afterwards, affix the seal or authorize any one to do it for him.



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When the defendants proved that neither the president nor the secretary *pro tem.*, who signed the mortgage, nor the regular secretary, who was the rightful custodian of the seal, had any knowledge of the way in which the mortgage became sealed, then the burden of proof was thrown on the complainants to show the circumstances under which the instrument was in fact sealed, and that it was rightfully and properly done.

Failing to do so, the conclusion is irresistible, that the seal was fraudulently abstracted from the lawful custodian of it, and wrongfully affixed to the mortgage.

The Revised Statutes of Wisconsin of 1849 were in force when this mortgage was given, and section 1 of chapter 59 prescribes the manner in which conveyances of real estate can be made, and it is as follows:

“Conveyances of lands or of any estate or interest therein may be made by deed, signed and sealed by the person from whom the estate or interest is intended to pass, being of lawful age, or \*by his lawful agent or attorney, and acknowledged or [\*718] proved and recorded as directed in this chapter, without any other ceremony whatever.”

Section 30 of this same chapter defines what is meant by conveyances as thus used, and is as follows:

“The term conveyance, as used in this chapter, shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged or assigned, or by which the title to any real estate may be affected in law or equity, except wills, leases for a term not exceeding three years, and executory contracts for the sale or purchase of lands.”

This mortgage, not having been sealed by the Iron Company, or under its authority, was not executed in conformity with law, and is therefore invalid and of no force and effect as a legal mortgage.

It is argued, that if not a legal mortgage, it is an equitable one, and that the court should not have dismissed the bill, but granted such relief as equity could give. But *this* bill seeks a foreclosure on the *sole* ground that a legal mortgage was given.

If the complainants have any rights under this instrument as an equitable mortgage, they can be tested, on a proper bill filed, in another suit.

The defendants in their answers further insist that this mortgage was given without authority of law, and by fraud and collusion on the part of the directors.

The Black River Falls Iron Company was incorporated by the general assembly of Wisconsin March 31st, 1856, to explore for

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minerals, and to mine, manufacture, and vend them. The administration of the affairs of the company was lodged in the hands of directors chosen from the stockholders to hold office for one year, and to be controlled by the rules and by-laws adopted by the stockholders. The power to sell and mortgage, and procure a common seal, was given.

By-laws were adopted, fixing the place of business at New Danemora, Jackson county, limiting the number of directors to five, who should appoint a secretary having no vote, and pro-  
[ \* 719 ] viding \* "that all documents, orders for the payment of money and receipts, to be valid, must be signed by the president and secretary."

A stockholders' meeting was held May 19th, 1858, and the following memorandum was entered among the minutes: "May 19th, afternoon session—Mr. C. W. Schmidt makes the motion that the directory hereafter to be appointed shall be authorized to endeavor, before all, the effecting of a loan of the highest possible amount, and in case of success to close it, and they are empowered to incur for the same the works with buildings and appertaining lands, carried." At the same meeting a board of directors was elected, viz: Charles Hauser, president, and John C. Fuhr, H. Pfiffner, Jacob Koehler, and John M. Levy, who chose Henry Richter as secretary.

The company was evidently embarrassed and in great need of money, and as the necessity was urgent and pressing, the directors were instructed (neglecting all other business) to obtain as large a loan as they could, and to secure it by a mortgage on the lands and works. The stockholders clearly contemplated a loan of money to carry on their business, and if a loan could not be effected without real security, power to mortgage was given to the directors. No authority was given to them to secure pre-existing indebtedness, and certainly none to secure themselves in preference to other creditors.

Did these directors, as guardians of an important trust committed to their care, endeavor, in good faith, to accomplish the object which their principals so much desired?

They met on the 13th day of August, 1858, at La Crosse, and not at their usual place of business, and failed to notify their regular secretary, who had the records in his charge, and who had acted as secretary since the organization of the company, to attend. No reason is assigned why the secretary was not notified, but as he was a large creditor, and was not to be favored, it is barely possible that the directors thought his presence would be embarrassing.

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As the by-laws required that all instruments of writing should be signed by the president and secretary, it was found necessary \* to appoint a secretary *pro tem.*, and one of the [ \* 720 ] directors was selected, who, unlike the regular secretary, was fortunate enough to have his debt provided for.

A note and mortgage were given to Daniel Koehler and Caspar Bircher for \$15,000, who were to let the company have \$1,200 in money, and \$800 in provisions, and to pay the following debts of the corporation:

Metzer, Koehler & Swab, a note and interest, . . .	\$3,570
John C. Fuhr, . . . . .	1,900
Jacob Koehler, . . . . .	1,256
John M. Levy, two notes and interest, . . .	\$2,428
Less \$124 charged, . . . . .	124—2,404

John C. Fuhr, Jacob Koehler, and John M. Levy, who were so lucky as to have their debts to the amount of \$5,500 provided for, were themselves directors, and it might be inferred that Koehler, the director, was interested in the firm of Metzer, Koehler & Swab, but there is no evidence of it. It is a little singular that the mortgagees, in order to get security for the \$2,000 which they agreed to advance, were willing to assume the payment of \$9,130. Such is not the usual course of dealing with those who in good faith make advancements and require security. The mortgage was signed and delivered by Hauser, the president, to Koehler, the director, for the mortgagees, who were neither of them present, and who did not actually make the advancements in money or provisions until some time afterwards. And Bircher, one of the mortgagees, as if to fix the true character of this transaction beyond cavil, in a few weeks from the giving of the deed, for the expressed consideration of \$7,000, transfers his entire interest to Koehler and Pfiffner, two of the directors. Instead of honestly endeavoring to effect a loan of money, advantageously, for the benefit of the corporation, these directors, in violation of their duty, and in betrayal of their trust, secured their own debts, to the injury of the stockholders and creditors. Directors cannot thus deal with the important interests entrusted to their management. They hold a place of trust, and by accepting the trust are obliged to \* execute [ \* 721 ] it with fidelity, not for their own benefit, but for the common benefit of the stockholders of the corporation.

In executing this mortgage, and thereby securing to themselves advantages which were not common to all the stockholders, they were guilty of an unauthorized act, and violated a plain principle of equity applicable to trustees. "The directors are the trust"

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or managing partners, and the stockholders are the *cestuis que trust*, and have a joint interest in all the property and effects of the corporation, and no injury that the stockholders may sustain by a fraudulent breach of trust can, upon the general principles of equity, be suffered to pass without a remedy."

Angel & Ames on Corporations, edition 1861, sec. 312; The Charitable Corporation v. Sutton, (2 Atkyns, 404;) Robinson v. Smith, (3 Paige, 220;) Hodges v. New England Screw Co. (1 Rhode Island, 321;) York and North Midland Railway Co. v. Hudson, (19 Eng. L. & E. 361.)

The decree dismissing the bill is affirmed.

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MORAN and others, Plaintiffs in Error, v. THE COMMISSIONERS OF MIAMI COUNTY.

2 Black, 722.

MUNICIPAL BONDS.

1. In construing the act giving powers to a corporation, neither privileges, powers, nor authorities can pass, unless they are given in unambiguous words; and such an act giving special privileges must be strictly construed.
2. The cases in regard to municipal bonds issued to railroad companies reviewed, and their principles reaffirmed.
3. When these bonds and their interest coupons, which are made payable to bearer, are placed upon the market, they are to be treated as commercial securities; and the equities existing between the makers and the original payees cannot be inquired into in an action brought to collect the amount due on them.
4. Effect of recitals in bonds so issued in the hands of innocent holders for value.

WRIT of error to the circuit court for the district of Indiana.  
The case is stated in the opinion.

*Mr. Porter*, for plaintiffs.

*Mr. Ross*, for defendants.

\* Mr. Justice WAYNE delivered the opinion of the court.

This cause has been fully argued. It is an action to recover the interest in arrears on coupons annexed to bonds which were issued by Miami county, payable to the Peru and Indianapolis Railroad Company, or bearer, and which is declared in the [\*723] bonds to be given for a loan of money. We \*are relieved from the task of considering several of the arguments of counsel and the pleadings on the record, believing, as we do, that the defendants are estopped from denying the declarations as to the

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purpose and cause for which the bonds were issued, and that the coupon holders had a right to infer from the face of the bonds that they had been regularly issued by the county of Miami.

It is not a new case to this court, either in its facts or the principle involved. The object of this court has been in cases of a like kind, and it is still its purpose, to give to the contracts of counties for the purchase of railroad stocks and for borrowing money to aid in the construction of railroads and other internal improvements, a strict interpretation of the legislative acts empowering them to do one or the other ; but at the same time to give protection to the *bona fide* holders of such contracts as have been put on sale in the money market, by corporations or by counties acting corporately, against their efforts to be relieved from the responsibilities of official acts, in putting such papers into circulation, for capitalists to invest money in them, on assurances that the principal and interest would be paid accordingly.

We repeat now, as appropriate to the subject-matter of the case in hand, as it was in the case in which this court said it, that corporations are as strongly bound as individuals are to a careful adherence to truth in their dealings with mankind, and that they cannot by their representations or silence involve others in onerous engagements, and then defeat the calculations and claims their own conduct had superinduced. *Zabriskie v. Cleveland, Columbus, and Cincinnati Railroad Company*, (23 How. 400.) In our construction of the act of Pennsylvania to incorporate the Northwestern Railroad Company, the court said, that neither privileges, powers, nor authorities, can pass, unless they are given in unambiguous words, and that an act giving special privileges must be construed strictly. That in case a sentence is capable of having two meanings, a construction must be given favorable to the public. However, that in applying those principles of construction, it must be done with reference to the \* subject-matter contemplated by the [\* 724] legislature as a whole, so as not to allow its manifest purpose and design to be defeated by denying the use of means by which the main object could only be accomplished.

In our leading case upon the subject, that of the Commissioners of Knox County *v. Aspinwall et al.*, (21 How. 539,) the suit having been brought for the interest due upon coupons annexed to one hundred and forty-two bonds, in which the main ground of defense was, that a board of commissioners had not power to execute them, and that on such account they were not binding upon the county of Knox, our answer and judgment was, that the bonds on their face import a compliance with the law under which they were issued;

and that the purchasers of them were not bound to look further for evidence of a compliance with the conditions annexed to the grant of power to issue them.

In confirmation of such conclusion we then cited the case of the Royal British Bank v. Tarward, (6 Ellis & Blackburne, 327,) decided in 1856 in the exchequer chambers, in error from the court of queen's bench, the decision of which we will now give in full, on account of the principle and its peculiar application to the pleadings in the case before us. Jervis, C. J. "I am of the opinion that the judgment of the court of queen's bench ought to be affirmed. I am inclined to think the question which has been principally argued, both here and in that court, does not necessarily arise, and need not be determined. My impression is, though I will not state it is a fixed opinion, that the resolution set forth in the replication goes far enough to satisfy the requisites of the deed of settlement. The deed allows the directors to borrow on bond such sums of money as shall, from time to time, by a resolution passed at a general meeting of the company, be authorized to be borrowed, and the replication shows a resolution passed at a general meeting authorizing the directors to borrow on bond such sums for such periods and rates of interest as they might deem expedient, in accordance with the deed of settlement and the act of parliament; but the resolution does not otherwise define the amount to be borrowed. That seems to me to be enough. If that be so, [ \* 725 ] the other question \* does not arise. But whether it be so or not, we need not decide, for it seems to us that the plea, whether we consider it a confession and avoidance, or a special *non est factum*, does not raise any objection to the advance as against the company. We may here take for granted that the dealings with these companies are not like dealings with other partnerships, and that the parties dealing with them are bound to read the statute and deed of settlement. But they are not bound to do more. And the party here, on reading the deed of settlement, would find, not a prohibition from borrowing, but a permission to do so on certain conditions. Finding that the authority might be made complete by a resolution, he would have the right to infer the fact of a resolution authorizing that which, on the face of the document, appeared to be legitimately done."

At an ensuing term of this court we had under consideration the case of Bissell v. City of Jeffersonville, and it was fully discussed by us in connection with the English and our own case of Aspinwall, &c. We said there: "When the contract has been ratified and affirmed, and the bond issued and delivered to the railroad

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company in exchange for stock, it was then too late to call in question the fact determined by the common council—and, *a fortiori*, it is too late to raise that question in a case like the present, where it is shown that the plaintiffs are holders for value. Certified copies of the proceedings were exhibited to the plaintiffs at the time they received the bonds, &c., and whether we look to the bonds or recorded proceedings, there is nothing to indicate any irregularity, or to raise a suspicion that the bonds had not been issued pursuant to lawful authority. We hold that the company and its assigns, under the circumstances of the case, had a right to assume that they imported verity." It would be difficult to find cases more controlling of that before us than those which have just been cited.

The same ruling was made by the court in the case of the Commissioners of the County of Knox *v. Wallace*, (2 How. 546.) It was substantially repeated in *Aspinwall et al. v. The Commissioners of the County of Davis*. This was brought to this court from the circuit court of Indiana upon a certificate of a \* division [ \* 726 ] of opinion between the judges. The points were, whether by the act of incorporation of the Ohio and Mississippi Railroad, and the amendments to it of January, 1849, any right to county subscriptions had been vested in the company, to exclude the operation of the constitution of Indiana, which took effect on the 1st of November, 1851, and whether the railroad company had acquired any right to subscription of the defendant as was protected by the constitution of the State. Both questions were answered negatively. But we said it was done reluctantly, for the subscriptions to the stock by the board of commissioners were made in good faith to the railroad company, and also sold by it, and purchased by the plaintiff in confidence of their validity.

With these cases on our minds, we will now proceed to give the facts and circumstances of the present case, that it may be seen whether there is anything in them to take it out of our decisions.

The abstracts of it by both counsel are so similar that either may be used without giving to the other any advantage.

It is an action of assumpsit, brought by the plaintiff in error, on interest warrants or coupons, annexed to fifteen bonds of the county of Miami for \$1,000 each, bearing date the 21st of August, 1851, redeemable in ten years from the 1st of September following. The bonds were payable to the Peru and Indianapolis Railroad Company, or bearer, at the office of the treasurer of Miami county, in Peru, bearing an interest of ten per cent. per annum, payable semi-annually at the same place. The suit is for a failure to pay cou-

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pons for the years 1857 and 1858, amounting to \$3,000, the interest accrued before having been paid by the railroad company. It is averred in the declaration that the bonds had been issued by Miami county, in pursuance of powers conferred on its board of commissioners by the laws of Indiana, and particularly by an act approved January 6th, 1849, entitled an act to authorize the commissioners of Hamilton, Miami, and Tipton counties to borrow money. How-

ard county was afterwards permitted to borrow money.

[ \* 727 ] The language of the act authorizes the loaning of \*money to the board to any amount not exceeding \$50,000, from time to time, at any rate of interest, not more than ten per cent. per annum. The second section is, that all persons loaning money to the counties or either of them, are authorized to receive any rate of interest upon such loans as may be agreed upon, not exceeding ten per centum.

The Peru and Indianapolis Railroad Company was incorporated in January, 1846. The 28th section of the charter authorizes the county commissioners of each county through which the road shall pass to take, by an order for either county, as much stock in it as they may think proper. After the act permitting the counties to borrow money had been passed, the railroad company, urged by the condition of its finances, appointed a committee to apply to the auditors of the counties of Hamilton, Miami, and Howard, to call special sessions of the boards of the commissioners of their respective counties to consider proposals which they wished to make. In a meeting afterwards held, the committee stated that they were required to ask from the counties additional subscriptions to the stock of the railroad company. From the counties of Hamilton and Miami respectively, twenty thousand dollars, and from Howard county ten thousand dollars. The committee then said that their subscriptions would be received, if the respective counties would issue bonds bearing ten per cent. interest per annum, redeemable in ten years, with coupons annexed to them, which the railroad would receive if the bonds were made payable to the company, or bearer, for the purpose of borrowing money upon them, to be applied to the payment of the stock which either of the counties should subscribe for. As a further inducement to the counties to do so, the committee stated that upon the subscription being made, and the bonds being issued, that the railroad would issue stock to the county for its subscription, credited in full to the amount of its bonds; and for the issue of the bonds, that the president of the railroad would execute an obligation binding the company to pay the interest annually upon the bonds as it became due, until the



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principal became payable, and then the principal also ; but that when \* both principal and interest had been paid [ \* 728 ] by the railroad company, that the counties would return to it the stock certificates which they had received when the bonds were issued, if it did not wish to retain it. And it was further agreed between the parties, if the counties, or either of them, should at any time before the redemption of the county bonds by the railroad company elect to surrender to it its obligation, and assume the payment of the interest that shall accrue afterwards, and the principal also when it became due, that the stock issued to the counties should become absolute in their favor, entitling them to all future dividends on the stock. But that until such assumption had been undertaken and performed, the stock was merely to be held as a security by the counties for the performance of the stipulation of the railroad company, but not entitling them to dividends, though it would give them the right to vote the stock in elections for directors. These propositions were considered by the auditor and board of commissioners of Miami county. It resulted in an issue by them of twenty bonds, one thousand dollars each, in which it is declared in the bonds "that there is due to the president and directors of the Peru and Indianapolis Railroad Company, or bearer, one thousand dollars from the county of Miami, payable in ten years from the first of September, 1851," this bond being issued for a loan of the amount to the county, as authorized by an act of the State of Indiana, permitting the commissioners of Hamilton, Miami, and Tipton counties to borrow money. The coupons or interest warrants annexed to the bonds are in these words :

AUDITOR'S OFFICE, *Miami county, Peru, Indiana.*

The treasurer of said county will pay the legal holder hereof one hundred dollars on the first day of September, 1857, on presentation thereof, being for interest due on the obligation of said county, No. 16, given to the Peru and Indianapolis Railroad Company. By order of the Commissioners.

IRA MENDENHALL, *County Auditor.*

The interest warrants, payable on the 1st September, 1858, are like the preceding ; and others of the same kind are annexed to the other fifteen bonds legally held by the plaintiff in error.

\*The bonds were delivered to the railroad company, [ \* 729 ] were received by it in payment of the certificate of stock, and the county of Miami was credited with \$20,000 upon the certificate. The railroad company then offered them for sale, transferred them to purchasers as commercial securities by endorsement, and the plaintiff in error bought them in the full confidence that

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the consideration for which they had been issued was truly expressed on the face of the bonds. The county retained the stock certificate and voted it on the election for directors as its own. Thus matters stood between the railroad company and the county of Miami, both being satisfied with what had been done, and that they had acted conformably to their respective powers, until the railroad ceased to pay to the holders the interest warrants.

Upon the trial of the case, the defendants filed a plea of non-assumpsit, and the plaintiff joined issue by a similiter. At the same time the defendants put in several pleas, affirming that several irregularities had been committed by the board of commissioners of Miami county and the railroad company, in their negotiation and proceedings, for the issue of the bonds and interest warrants, by the force of which it is declared that the bonds were void at law, and that they were purchased by the plaintiff with notice of these irregularities.

We have examined these pleas critically, and find the facts stated in each to be imputations, only calculated to raise supposed equities between Miami county and the railroad company, in which the plaintiffs in error, as the legal holders of the bonds and coupons, can in no event have any concern, even if it be admitted that they had notice of such irregularities when they bought, as all of them relate to circumstances contradictory to the declarations upon the face of the bonds.

Though the proposals, or contract as it is termed in the record, for additional subscriptions of stock are confusedly expressed, there can be no doubt that it was its intention to solicit subscriptions, and that it was so understood by the board of commissioners of Miami

county when it issued the bonds; and that in furtherance [ \* 730 ] of such purpose, the parties proceeded to devise the \* means to pay for the subscription by borrowing money. In doing that there was nothing irregular in the transaction. Both parties seem to us to have acted within their respective powers; the railroad within its charter to allow the counties to subscribe for stock in it, and the county of Miami to do so, and according to the power given to it to borrow money. When the railroad undertook to pay the interest upon the treasury bonds and the principal also when that became due, it was substantially a loan to the county from the time of the execution of the bonds until their maturity, though it was provided that the county might then, upon the cancellation of these bonds, decline to return the certificate of stock which had been issued to it.

The narrative of the negotiation which led to the issue of the

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bonds and interest warrants, brings the case, by the declaration in the bond as to the object and purpose for which they were issued, so entirely within what we have shown to be the law in such cases as to the inference which may be made from the face of the bond, of its having been regularly executed by the party having authority to do it, that we are relieved from the task of considering much of the argument made to us by counsel; and from examining the special pleas which were put in by the defendant, or the reasoning of the court upon the third and fourth pleas upon which it rested its judgment for the dismissal of the plaintiff's case. If the contract and bonds are considered in connection with the authority of the board of commissioners of Miami county to issue them, it must be obvious that several of the points presented to us by the counsel of the defendant do not arise in the case. For instance, whether the board of commissioners of Miami county had power to issue them at the time and for the purpose for which it was done, or that the bonds and interest warrants, by having been endorsed to the plaintiff by the railroad company, were subjected to the revised statutes of Indiana, making certain promissory notes, &c., negotiable by endorsement thereon, so as to vest the interest in the contract to the assignee, and permitting the obligor to set up any defense to the obligation against the assignee that he could have done against the original obligee, or that it was necessary to them

\*that the bonds were issued by virtue of a special statute, [\* 731] and if that did not exist, that the bonds may be held to be void.

It is true that all of these points were as well argued by the counsel of the defendants as the circumstances of the case permitted, but in every instance, either of argument or of pleading, the point of estoppel, as made by the plaintiff's counsel in the court below, and renewed here by him with vigor by the citation of many cases, was not directly met by the counsel of the defendant. The first point of the plaintiff's counsel was, that even if the bonds had been issued irregularly, and not in strict conformity with the power of the county to borrow money, the defendant is, nevertheless, estopped by the bonds themselves, which, on their face, express that they were issued for a loan of the amount to the county, as authorized by the act of the general assembly to borrow money, and that such bonds being habitually received and passed as commercial securities, and being *bona fide* in the hands of the plaintiff, they were entitled to recover the amount of interest sued for, notwithstanding there might be equities between the original parties to the transaction. It is not necessary for us to follow out the plaintiff's

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argument in this particular, thinking it, as we do, conclusive. We think that the bonds in this case, with interest warrants annexed, are commercial securities, though they are not in the accustomed forms of promissory notes or bills of exchange; that the parties intended them to be passed from hand to hand to raise money upon them, so that a full title was intended to be conferred on any person who became the legal holder of them, and that the original maker, under such circumstances, has no equity to prevent the recovery of the interest.

But the real point in this case, as made by the counsel of the plaintiff in error, and sustained in argument by numerous adjudicated cases, was, that as it is declared in the bonds that they were issued by the board of commissioners of Miami county by order or resolution, pursuant to the statute authorizing the county to borrow money, passed at a regular meeting of the board, to be used by the

Peru and Indianapolis railroad, payable to the company, [ \* 732 ] or bearer, for a loan to the county that \* the *bona fide* holders of the bonds, whether so by endorsement or delivery, had a right to infer that the bonds had been lawfully issued, by which the county of Miami is estopped in a suit for the recovery of the interest from denying by pleas that its bonds had been issued to the Peru and Indianapolis railroad for a loan of money to the county of Miami. We think and adjudge that the recitals in the bonds are conclusive, constituting an estoppel *in pais* upon the defendants in this suit. In support of this conclusion, we cite the following cases: Girard v. Bradley, (7 Ind. § 600;) Reeves v. Andrews, (Ibid. 207;) Frances v. Porter, (213;) May v. Johnson, (3 Ind. 448;) Trimble v. State, (4 Black, 435;) 8 Blackford, 258; Ryan v. Vanladingham, (7 Ind. 416;) 24 How. 375; 23 How. 381; 29 Connecticut Rep.; Society of Saving v. City of New London, (103;) 1 Vesey, senior, 123; 8 Blackf. 47. It is the opinion of this court that the defendant is estopped from setting up the defenses taken as set forth in the transcript of the record of this case, and that the judgment of the court below sustaining the demurrer should be, and is hereby reversed and annulled, and that the case should be remanded to that court, with directions to award a *venire facias de novo*.

# INDEX.

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## ADMIRALTY.

### COLLISION.

1. In a collision in the harbor of New York between a lighter managed by oars and a ship towed by a steam tug, the tug was held to be in fault, because it had no look-out, and changed its course so as to bring on the collision at a time when those in charge of the lighter could not prevent it. *The Hector and The Wisconsin*, 24 H. 110.....23.
2. As between the tug and the ship which she was towing the tug is responsible, because it sufficiently appears that those in charge of the tow were in full control of both vessels, the ship having no crew and no control, or means of control, of the course and speed of the two vessels, or of either of them. *Ib.*
3. A steamboat ascending and a loaded flat-boat descending collide in the day time in the middle of the Ohio river, having been in full view of each other for a mile and a half. Held, that it was the duty of the steamboat to have kept out of the way, and the flat-boat cannot be held in fault for floating with the current without using her oars to avoid collision, unless it was shown very clearly that she could safely and successfully have done so after the danger of collision became apparent. Those in control of her had a right to suppose that the steamboat would take measures to avoid a collision. *The Steamboat Doctor Robertson*, 24 H. 228.....90.
4. It is a fault for which a steamship must be held responsible, when a collision is produced by the mistake of the pilot in putting the helm to the starboard, because he supposed his vessel was backing, when in fact she was moving forward at the rate of six miles an hour. *The Steamship Pennsylvania*, 24 H. 307.....141.
5. Inevitable accident is not to be presumed solely from the circumstances attending the imminence of the collision, but is to be determined by all the circumstances affecting the skill and care with which the vessel is navigated, as she comes within the distance of possible collision. *Ib.*
6. A tug having a barge with many others in tow, held, on a minute examination of much testimony, to be in fault for bringing the barge, while landing her, into collision with a sloop, whereby the barge was so injured that it afterwards sunk. *The Steamer New Philadelphia*, 1 Black, 62.....361.
7. The schooner had a right to use a fender to keep off the barge; and though this may have contributed to the injury to the barge, it does not follow she should pay part of the loss. *Ib.*
8. If, in a suit against the schooner, she might be held liable, that is no defense, as this suit is founded on her carelessness in executing her contract to tow the barge safely and skillfully. *Ib.*
9. In this case we are of opinion, that the weight of testimony is in favor of the charges of the libel and of the decree rendered by both the district and circuit courts. *The Ship Marcellus*, 1 Black, 414.....525.
10. We reassert the proposition, that when the controversy turns on the weight of evi-

dence, and the district and circuit courts both have found the same way, the presumption is against the appellant. *Ib.*

See JURISDICTION, 8, 9, 10, 11, 12.

— DECREE A LIEN ON REAL PROPERTY.

1. Whenever, by the laws of the State, the judgments or decrees of the State courts are liens on real estate, the judgments and decrees of the courts of the United States sitting in that State are liens under similar circumstances. *Ward v. Chamberlain*, 2 Black, 430.....741.
2. A decree of the district court of the United States sitting in admiralty operating against the parties *in personam* comes within this principle. *Ib.*
3. Where an execution has been levied upon real estate, which issued from the district court on a decree in admiralty, a bill in equity by the plaintiffs in the execution will lie to remove and ascertain doubtful incumbrances which are impediments to a fair sale of the land, as in case of execution at common law. *Ib.*

— DELIVERY OF CARGO TO AND BY THE VESSEL.

1. The bar at the mouth of the harbor of Mobile, some fifteen miles from the city, prevents vessels of large draft or heavily laden to pass over it. It is the custom of shippers at that place for the master of the vessel to hire and pay lighters to receive the freight at the city wharf and bring it to the ship's sides: Held, that a delivery to the lighter by the shipper is a delivery to the master, and is the commencement of the voyage outward. *The Barque Edwin. Bulkley v. Naumkeag Steam Cotton Co.* 24 H. 386.....187.
2. That where the goods are lost by an explosion of the lighter before being received on board the ship, the shipper has a lien on the ship for the failure to deliver the goods at the port of destination, to wit, Boston. *Ib.*
3. The English cases examined on the subject. *Ib.*

COMMON CARRIER, 1, 2, 3, 4, 5.

— JURISDICTION.

1. The twelfth rule of admiralty practice, presented by the supreme court in 1844, authorized a proceeding *in rem* where the State law gave a lien for supplies and repairs in a domestic port, but this rule was altered, and process *in rem* denied, unless the lien was given by maritime law as an alteration of the rule which took effect May 1, 1859. *The Steamer St. Lawrence*, 1 Black, 522.....585.
2. These rules refer exclusively to the character of the process to be used in certain cases, and this change has no relation to the question of the jurisdiction of the court. *Ib.*
3. While the decisions of this court show the difficulty which has been experienced in fixing the boundaries of the jurisdiction in admiralty and maritime cases—a difficulty increased by the complex nature of our federal and State jurisprudence—it is certain that no State can enlarge it, nor can an act of congress or a rule of this court make it broader than the judicial power may determine to be its true limits. *Ib.*
4. But congress may prescribe the forms and modes of proceeding in the tribunals which it establishes, and may authorize the court to proceed by attachment against property, or by arrest of the person, as it may think best. *Ib.*
5. The acts of congress and the decisions of this court examined, and the power of this court to frame rules held to extend to the modes of proceeding and to the process to be used, but not to the subject-matter of the jurisdiction. *Ib.*
6. The reasons for the change of the rule given and considered, to wit: the embarrassment arising in the federal courts from the varying and conflicting State laws, and the conflict of rights arising under them. *Ib.*
7. In this case, as the State law gave a lien, and the rule of the court which authorized process *in rem* to enforce it was at that time in operation, the right to this process was not lost by the subsequent modification of the rule. But see *The Latawana*, 21 Wall. 558. *Ib.*

8. It is not essential to the jurisdiction of the district courts as courts of admiralty, in cases of collision, that either vessel should be engaged in foreign commerce or in commerce between the States. *The Propeller Commerce*, 1 Black, 574.....615.
9. Nor is the jurisdiction defeated because the place of collision was within the body of the county of a State. *Ib.*
10. The suit in such cases may be prosecuted either *in personam* or *in rem* in any district where the person or the vessel is found, though the collision occurred in a different district. *Ib.*
11. The owner of the vessel injured can recover not only for the injury to his vessel, but also for the damage to his cargo. *Ib.*
12. This court reaffirms the doctrine of the steamer *St. Lawrence*. 1 Black, 525; (4 Miller, 585.) *The Sloop Potomac*, 2 Black, 581.....842.

— LIABILITY OF OWNERS.

1. The act of congress of March 3d, 1851, (9 U. S. Statutes, 635,) which exempts ship owners from liability for loss by fire, provides that the act "shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation." Held, that a steamboat used in navigating the waters of the great lakes from Buffalo to Detroit was not within the exception of the *proviso*, as she was not used in inland navigation, because the great lakes are fresh water seas lying between us and a foreign nation, and along the borders of different States of the Union. *Moore v. The American Transportation Co.*, 24 H. 1.....1.
2. The words "barges," "canal boats," and "lighters," and vessels used in navigating rivers, are to be taken as suggestive of the class of other vessels used in inland navigation. *Ib.*
3. One purpose of the act was to place our ship owners on equal condition with foreign owners; and the policy of the law seems to be as applicable to the immense commerce of the great lakes as to ocean vessels. *Ib.*

— MARITIME LIEN.

1. The maritime lien on goods carried for the freight is, like the lien of the common carrier on land, only the right to hold the goods until the freight is paid, and is inseparably connected with and dependent upon possession by the carrier. *Sears v. Wills*, 1 Black, 108.....386.
2. So long as he has this possession he may enforce the lien by a proceeding *in rem* in an admiralty court; but this right is lost by parting with the possession. This is a general rule as to maritime liens in this country, whatever may be the doctrine in European countries, where the civil law prevails. *Rae v. Cutler*, 7 How. 729, (17 Curtis, 374;) *Dupont de Nemours v. Vance*, 19 How. 171, (1 Miller, 624.) *Ib.*
3. But as the course of business in delivery for many reasons makes it expedient and desirable that the goods should be landed, examined, and even placed in a warehouse of consignee before the freight is paid for, the court will, when there is a custom or an express understanding, verbal or otherwise, that the lien is to be retained, hold that such a transaction is not an absolute delivery, but a deposit for the time, and hold that the ship-owner is still constructively in possession, so far as to preserve his lien. *Ib.*
4. But where, as in the present case, the consignee was party to the charter-party by which such an agreement as to delivery was made, and there was nothing in the transaction by which the goods were delivered absolutely which tended to preserve the lien, they were not liable in a proceeding *in rem* to enforce it. *Ib.*
5. The lien once acquired was not waived by the acceptance of the owner's notes by any rule of maritime law, unless it is shown that the libelants agreed to receive them in lieu of their original claim. *The Steamer St. Lawrence*, 1 Black, 522.....585.
6. A purchaser of the vessel, under such circumstances, though he had no notice of the lien, does not take her discharged of it in his hands. *Ib.*

## — SALVAGE.

1. To constitute a case of derelict, the abandonment must have been final, without hope of recovery or intention to return. For the crew to leave the vessel temporarily, with intention to return after obtaining assistance, is no such final abandonment. *The Island City*, 1 Black, 121 ... 393.
2. Where the danger from which the vessel was rescued was continuous, the schooner Kensington first assisting, then telegraphing for the Forbes, which also aided, but, after relieving the first peril, had to leave her anchored, but not in entire safety, while she went for coal, and then the Westernport found her and brought her into a port of safety: Held, that it was a continuous peril, in which all the vessels named contributed to the rescue, and were entitled to salvage. *Ib.*
3. The usual rate proportion, of one-third to the owners of the rescuing vessel and two-thirds to the officers and crew, of what is allowed to that vessel, must be affirmed in this case, though the vessel was a steamer, because there is nothing in the pleadings or proofs raising the question. *Ib.*
4. But this court recognizes the fact that, in the case of a steamer, where that kind of motive power is the main element of success in the rescue, the rule may be different, and holds itself uncommitted when the question shall be fairly raised and argued before it. *Ib.*
5. While embezzlement or theft, secretly done by one or two of a crew, will not forfeit the right of others to salvage, a general plunder and stealing by officers and crew, which must have been known, without efforts to prevent it, will, as in this case, justify a refusal to allow any salvage to the officers and crew, and it lapses to the owners of the vessel. *Ib.*

## AGENCY.

## — COMMISSION MERCHANTS.

1. Where a merchant in Baltimore, through one H., made arrangements to consign goods to commission merchants in St. Louis, and before any goods were consigned wrote them a letter in which he stated the terms of the transaction, among which they were guaranteed, and would be held responsible for all goods shipped to them: it was held they were so responsible, though they had turned the goods over to the agent through whom the original arrangement was made. *Berthold v. Goldsmith*, 24 H. 536.....261.
2. That it did not vary their liability that said agent was to have half the profits as compensation, with a guaranty by the consignor that his compensation should amount to \$1,800 at all events. *Ib.*
3. There was no evidence in the case of any authority of H. to interfere with the goods or their disposition after they were received by consignees; and the latter are responsible, though they delivered them to him. *Ib.*

## — SPECIAL.

1. "I hereby appoint James Love, of Texas, my general and special agent, to do and transact all manner of business in which I may be interested there," did not authorize Love to sell and dispose of bonds of the republic of Texas in his hands belonging to the maker of this instrument. *Hodge v. Combs*, 1 Black, 192.....430.
2. The case is still stronger when the purchaser gives no evidence of having paid any consideration for the bond. *Ib.*
3. The agent and attorneys at law of a judgment creditor, having sold land of the judgment debtor and received a sheriff's certificate of the sale, which allowed by law a year for redemption, assigned the certificate to a party interested in the land, taking his note for the money: Held, that though this was without authority, yet, as the judgment creditor did not, when notified of it, disaffirm it positively, or order the note to be given up, and other circumstances showing his intention to abide by the



sale, it was to be treated as ratified by him. *Laflin v. Herrington*, 1 Black, 326.....482.

4. The failure to pay the note at maturity did not authorize either the original purchaser or his agent to sell any right or interest in the land after it had become valuable and a subject of speculation. *Ib.*
5. Where the agent had exceeded his authority, but with good motives, in purchasing coal for a vessel at a place not authorized by his instructions, it was properly left to the jury to say, under all the circumstances, whether the acquiescence of the principal ratified his acts. *Law v. Cross*, 1 Black, 533.....592.

#### APPEALS AND WRITS OF ERROR.

1. As is general in this country, the proceedings on an appeal or writ of error are rather a continuation of the litigation than the commencement of a new action. Hence, where a party in whose favor a judgment or decree is rendered leaves the State, and that judgment or decree is reversed on writ of error, with service of notice only by publication, as the statute directs, the final judgment or decree is binding and conclusive on him, as in any other case. *Nations v. Johnson*, 24 H. 195.....69.
2. Such a decree is evidence of the value of slaves at the time of the first trial and subsequently, in connection with parol testimony to the same purport. *Ib.*

See JURISDICTION OF SUPREME COURT, 1; PRACTICE IN SUPREME COURT, 2.

#### ATTACHMENT AND GARNISHMENT.

1. A bailee of goods, as a common carrier, is not guilty of conversion in refusing to deliver the goods to the owner, where they have been attached in his hands by legal process as the goods of another person. *Stiles v. Davis et al.*, 1 Black, 101.....384.
2. The service of such process on the bailee is a good reason for his refusal to deliver the goods according to his contract of transportation. *Ib.*
3. The remedy of the owner in such case is by an action against the sheriff, or the plaintiff in the attachment suit, if he had directed the sheriff in making the seizure of the goods. *Ib.*

#### ATTORNEY AND CLIENT.

See AGENCY, 677.

#### BANKS AND BANKING.

1. There is no want of diligence in presenting a bank check for payment on Monday morning drawn on the previous Saturday, though the drawee failed between Saturday and Monday, and holder's place of business was but eighty feet from the bank of drawee. *O'Brien v. Smith*, 1 Black, 99.....383.
2. The holder and payee of the check being the cashier of an unincorporated banking partnership, for whose use he received it, can maintain the suit in his own name. *Ib.*

#### CALIFORNIA LAND GRANTS.

1. Where the only archive evidence of a grant are the petition, the reference for information, and report, and the existence of an actual grant is, from all the circumstances, improbable, the claim will be rejected. *Palmer v. The United States*, 24 H. 125.....30.
2. The evidence examined in this case shows that the grant relied on was never signed by the officers of the department at all, or, if signed, it was after they were overthrown by the Americans, and had ceased to have authority to make grants of land. *Ib.*
3. Where a grant has been confirmed by the commissioners and the courts, and has been surveyed, and a patent issued to the grantees, the correctness of the survey cannot be disputed in an action of ejectment by persons in possession claiming under a title not perfected by survey and patent. *Greer v. Mezes*, 24 H. 268.....114.
4. A grant of Pico, purporting to be dated in April, 1846, never presented for record

- until 1849, no possession prior to that time, no evidence but the paper when it was signed, no petition or informe, is insufficient to justify its confirmation. *United States v. José Castro*, 24 H. 346.....163.
5. In the absence of record or archive evidence of a grant, there should be secondary proof that—1. At some former time the grant was regularly made and recorded in the proper office. 2. That the papers in that office, or some of them, had been lost or destroyed. 3. That within a reasonable time after the date of the grant there was judicial possession and acts of proprietorship by claimant. *Ib.*
  6. The court in this case makes a lengthy and close examination of the evidence, from which it comes to the conclusion that the papers offered are forgeries, and that no grant was ever made to claimant's intestate. *United States v. Knight's Administrator*, 1 Black, 227.....448.
  7. The absence of any record evidence of the grant, or of the loss of records in which it ever existed, held to be fatal to the claim. *Ib.*
  8. It was the custom in Mexico for the governor to grant or set apart to the Indians settled around a mission, called children of the mission, small lots of land, and the alcalde kept a book in which such grants were registered. This court recognizes such grants as valid, and holds they should be confirmed. *United States v. Wilson*, 1 Black, 267.....464.
  9. In the present case, the proof shows that such a grant was made and registered, and the grantee of claimant lived on the land; and though the record was lost in the confusion of the time of the American conflict, it is sufficiently established to be confirmed. *Ib.*
  10. But the claim received no support from a concession signed by Pio Pico, governor, on the 10th of July, 1846, after the Americans had taken possession of the country. *Ib.*
  11. There is no objection to the original grant to Piña in this case; and the fact that the date of his transfer to the present claimant was before the date of his grant, does not invalidate it. *United States v. Vallejo*, 1 Black, 283.....469.
  12. This is a claim for six leagues out of the eleven league grant to Castro, the whole of whose claim was rejected by this court, 24 How. 347, (4 Miller, 163,) and no additional evidence of value is now introduced. *United States v. Neleigh*, 1 Black, 298.....473.
  13. The court comments on the attempt of Pio Pico to make grants, after his overthrow as governor, by signing concessions, as a material fact, and that his secretaries, Morena especially, are unworthy of credit, as requiring caution in the court in confirming grants with no other support. *Ib.*
  14. The fact that some few documents were lost and destroyed by their removal under Fremont, is not to be received as a substitute for record evidence of title, until it is proved that the instrument produced was recorded in some book which is shown to be lost. *Ib.*
  15. Where a Mexican title is confirmed to the original grantee, it inures to the benefit of any previous assignee or grantee of a part or of the whole from him, and when the patent is issued to him on the survey the assignee or grantee may assert his right in a court of equity. *United States v. Covilland*, 1 Black, 339.....492.
  16. But such assignee or grantee cannot have a separate and distinct confirmation by the commissioner of his part of the original grant when the whole has been confirmed to the original grantee. *Ib.*
  17. The plaintiff in ejectment having produced a confirmation, survey, and patent from the United States for a Mexican grant, cannot be defeated by a Mexican claim still pending in the courts, though confirmed by the commissioners. *Singleton v. Touchard*, 1 Black, 342.....493.
  18. Such a claim, if valid, is but an inchoate equity, and cannot be made a defense to the legal title in the action of ejectment. *Ib.*
  19. The judgment of this court in this suit, as reported in 23 How. 249, (3 Miller, 522,) examined and explained as not authorizing the intervention of Miranda when the

- case was sent back. A *mandamus* to that effect refused by this court. *White's Administrator v. United States*, 1 Black, 501.....569.
20. The claimant in this case produced two grants, one purporting to be made under the colonization laws of Mexico of 1824 and 1828, which is wholly invalid for want of compliance with any of the requirements of these laws. *United States v. Vallejo*, 1 Black, 541.....595.
  21. The second is a sale of 100,000 acres of land for \$5,000, and a grant by the governor, signed by the secretary, in consideration of that sum, and raise the question whether the governor had authority to make such a sale. *Ib.*
  22. These laws of 1824 and 1828 were the only laws passed by Mexican authority for the disposition of the lands of the republic; and the law of the Spanish cortes of 1813 was not in force, and never has been, in the republic. *Ib.*
  23. The grant is also invalid for want of any record evidence of it in the proper book of that year, which is in existence, and for want of sufficient evidence of possession to overcome the absence of this record evidence. *Ib.*
  24. The claimants petitioned the board of commissioners, sitting under the act of 1851, for a confirmation of a grant of a mine. This court held the rules and regulations for grants of land under the colonization laws of 1824 and 1828 were inapplicable to mines, and that no grant of mining lands known to contain mines could be made under those laws. *United States v. Castillero*, 2 Black, 17.....645
  25. The laws of Spain concerning the discovery, the denouncement, the measurement or survey, delivery of possession, approval, and recording of a grant of a mine, were in force in Mexico, and a compliance with them was necessary to make a title to a mine. *Ib.*
  26. That because there did not exist in the department of California the tribunal to which the jurisdiction of mines belonged, did not excuse the failure of a claimant of a mine from complying with those laws, nor make good his title which wanted this compliance. *Ib.*
  27. Such a tribunal existed at the capital of the Mexican republic, and that government had preserved and continued both the jealous supervision and control of mines which had belonged to the government of Spain and its special tribunal for dealing with these matters. *Ib.*
  28. By these laws it was not the discovery or denouncement of a mine which gave a vested right in it, but the adjudication, admeasurement, and registration of proceedings which conferred that right. *Ib.*
  29. The title set up by claimants to the quicksilver mine now in controversy is fatally defective in all these respects, and for these reasons the claim is rejected. *Ib.*
  30. The claim in this case was rejected in this court, after confirmation by the commissioners and the district court on the following grounds: The alteration on the face of the grant of the date from the 12th of June, 1846, to 12th of February preceding. *United States v. Galbraith*, 2 Black, 394.....722.
  31. The absence of any archive evidence of the grant, or of the approval of the departmental assembly. *Ib.*
  32. The production of a certificate of the approval of this assembly, signed by the governor and his secretary, which it is conceded is a forgery or a falsehood, as the assembly had no session after the real date of the grant. *Ib.*
  33. The want of proof of possession and cultivation, and the extreme probability that the grant was fabricated by Pico and Moreno after the overthrow of their power by the United States. *Ib.*
  34. Where claimant shows no grant, and relies on nothing but long-continued possession, this will not avail when it is shown to be merely a permissive possession by payment of rent of the common lands of the pueblo, however long it may have been continued. *United States v. Chaboya*, 2 Black, 593.....849.
  35. This court reasserts that where a grant is confirmed, it enures to the benefit of the assignees of the grantee, and this court having confirmed the claim of the grantor as

- in Sutter's case, will not consider those of his assignee as a separate claimant. *United States v. Grimes*, 2 Black, 610.....863.
36. The present claimant asserts a right under Sutter. Sutter's claim has been considered, and eleven leagues confirmed and a much larger amount rejected. *Ib.*
37. It is not the duty of this court to decide whether this claimant is entitled to any part of the eleven leagues or not. He must establish this right by other proceedings. *Ib.*

## COMMON CARRIERS.

1. The signing of a bill of lading, acknowledging the receipt of the goods in good order and well conditioned, is *prima facie* evidence that, as to all circumstances which were open to inspection and visible, the goods were in good order. *Nelson v. Woodruff*, 1 Black, 156.....410.
2. But it does not preclude the carrier from showing, in case of loss or injury, that it proceeded from some cause which existed when the goods were received, but was not apparent, and for which, if proved, he will not be responsible. *Ib.*
3. But the burden of proof in such case is upon the carrier to rebut the *prima facie* case made by his bill of lading. *Ib.*
4. Lard received in casks in New Orleans in very hot weather, in a liquid condition, by reason of which it so acted on the barrels as to impair their capacity to retain it, resulting in large losses in leakage and evaporation, was not in good order and condition when so received, though apparently it was; and the carrier is not liable for the loss so occasioned. *Ib.*
5. Where a vessel having on board a perishable cargo, as oranges and lemons, is compelled by bad weather and injuries received to put into a port for repairs, and the master uses all possible diligence in repairing, and takes the best care he can of the cargo, which begins to decay, he is not responsible, nor are the owners of the vessel, for the loss by such decay. *Lawrence v. Denbrens*, 1 Black, 170.....420.
6. He is entitled to freight for so much of the cargo as is delivered, but not for that which was lost and thrown away in repairing in the port of distress. *Ib.*
7. The vessel is liable for sea damage to cotton stored on deck, there being no evidence of an agreement by shippers that it might be so carried. *Clifton v. Sheldon*, 1 Black, 494.....567.
8. Whether this damage was caused by the fault of the master of the ship is a question of disputed testimony; and this court will not nicely criticize it after the findings of the circuit and the district courts—both in favor of appellee. *Ib.*

ADMIRALTY, DELIVERY OF CARGO; ADMIRALTY, MARITIME LIEN, 1, 2, 3, 4; ATTACHMENT, 1, 2, 3.

## COMPENSATION OF OFFICERS.

1. The proviso in the act of March 22, 1852, that no register or receiver shall receive, during any one year, a greater compensation than the maximum allowed by law, is prospective; and the allowance of fees for certain services made by subsequent statutes will not affect the limit of his compensation. *United States v. Babbitt*, 1 Black, 55.....356.
2. That limit is \$3,000; and the acts allowing fees for locating military land warrants, passed subsequently, do not authorize those officers to retain or receive more than that sum. *Ib.*

## CONSTITUTIONAL LAW.

1. The exercise of the original jurisdiction of this court does not depend on the existence of acts of congress prescribing the mode in which it shall be done. *Kentucky v. Dennison*, 24 H. 68.....10.
2. The clause of the federal constitution, which declares that any person charged with treason, felony, or other crime, in any State, who shall flee from justice and be found

- in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime, was intended to include any offense made punishable by the law of the State in which it was committed. *Ib.*
3. The right which it gives to the executive authority of the one State to demand the fugitive from the executive authority of the other State is absolute, and so is the correlative obligation to deliver him up. *Ib.*
  4. Congress, by the act of the 12th of February, 1793, provided the mode by which this constitutional provision should be carried into execution; and after describing the nature of the evidence to be produced to the executive of whom the demand is to be made, declares that it shall be his duty to cause the fugitive to be arrested and to be given up to the properly authorized agent of the State making the demand. *Ib.*
  5. But these words, "It shall be the duty," &c, are not used in a mandatory sense, but are expressive merely of the moral obligation of the executive to obey the constitution of the United States on that subject. *Ib.*
  6. Nor was it within the constitutional power of congress to impose this duty or to compel its performance by any officer of the State; the duty rests solely on the sense of honor and good faith of the States as declared by the constitution. Hence, if the governor of any State refuses to discharge this duty, there is no power delegated to the general government, either through the judicial department or any department, to compel its performance. *Ib.*
  7. A statute of the State of California which imposes a stamp duty on every bill of lading given for gold or silver in coin or bars or in other form transported from any point in the State to any point without the State, is in effect a tax upon the gold or silver so transported. *Almy v. State of California*, 24 H. 169.....52.
  8. It is therefore a tax upon a specific class of exports, and is forbidden by the constitution of the United States, and the law imposing it is therefore void. *Ib.*
  9. A State statute which allows a judgment creditor of a mortgagor to redeem the land within two years after a sale under a decree of foreclosure of the mortgage is a statute impairing the obligation of the contract of mortgage, as to all such mortgages as were in existence when the statute was enacted. See 1 How. 311, (14 Curtis, 628;) 2 How. 612, (15 Curtis, 228;) 3 How. 707, (15 Curtis, 608.) *Howard v. Bugbee*, 24 H. 461.....230.
  10. The rule of this court has universally been, that the construction given by the courts of the States to State legislation and State constitutions have been conclusive on us with a single exception, and that is when it has been called upon to decide whether a legislative act creates a contract. *The Jefferson Branch Bank v. Skelly*, 1 Black, 436.....534. *Franklin Bank v. State of Ohio*, 1 Black, 474.....552.
  11. The obligation imposed upon this court by the constitution to determine whether a State statute impairs the obligation of a contract, demands of us that we decide independently of State courts whether there is a contract, though it be in the form of legislative enactments. *Ib.*
  12. In every case, therefore, where a subsequent statute is asserted to impair the obligation of a contract found in a former statute, it is a necessity that this court, in reviewing the judgment of a State court on that question, must decide independently of the State court on the existence of a contract in the first statute. *Ib.*
  13. This court reaffirms the right of a State legislature, unless prohibited by the language of its constitution, to contract to release the exercise of the taxing power as to a particular thing, corporation, or person. *Ib.*
  14. The court also adheres to and comments on the cases in which it has decided that the 60th section of the act of 1845 of the State of Ohio (the bank charter) is a contract of exemption from all other taxes but those therein mentioned, and that the act of 1852 is a violation of that contract, and therefore void under the provisions of the constitution of the United States against impairing the obligation of contracts. *Ib.*
  15. The court reiterates the proposition, that the act of the Ohio legislature of April 5

1859, concerning taxation, impairs the obligation of the contract of that State with the bank on the same subject found in the 60th section of the act of 1845. *Wright v. Sill*, 2 Black, 544.....812.

CORPORATIONS, 11; EQUITY, STATUTORY LIEN, 2; FERRIES OVER OHIO RIVER, 4, 5, 6.

#### CONTRACTS.

1. A statute of Pennsylvania, reciting the previous usefulness of Christ Church Hospital, and the decay of its buildings and embarrassment for funds, and enacting "that the said property, including ground rents, now belonging and payable to Christ Church Hospital, so long as the same shall continue to belong to said hospital, shall be and remain free from taxes," is not a contract for perpetual exemption from taxation, but a gratuity subject to the pleasure of the legislature as to its duration. *Christ Church v. The County of Philadelphia*, 24 H. 300.....136.
2. A subsequent statute of the State subjecting that property to taxation in the hands of the hospital does not impair the obligation of any contract. *Ib.*
3. This court, following the decision of the court of Maryland, held, in the case of *Gooding v. Oliver*, 17 How. 274, that the contract of the Baltimore Company with Mina, to furnish means to make war against Spain, was void, and the assignee in insolvency had no rights under such contract made by his insolvent. But Mexico, after her independence, having by treaty agreed to pay the claimants under the Mina contract, the claim is relieved from this taint of illegality, and passes to the assignee in insolvency proceedings instituted on another insolvency subsequent to this agreement to pay by Mexico. *Mayer v. White*, 21 H. 317.....148.
4. An agreement to sell land for a specified sum, and on the payment of a part of the price to make a deed to the vendee, is a covenant to convey a good and perfect title free from all incumbrances. *Washington v. Ogden*, 1 Black, 450.....542.
5. The agreement was also expressly "to be dependent on the surrender and cancellation of said contract with Wright," a previous contract of sale of the same land of record. This was not done within the time at which the cash payment was to be made, and though the declaration avers that it was complied with, the proof is wholly insufficient. It was therefore error in the court to instruct the jury that by a verbal arrangement between Clapp, purchaser from Wright, and Wright himself and the vendor, the contract with Wright was delivered up. This was not a surrender and cancellation within the meaning of plaintiffs' covenant. *Ib.*
6. The main question in this case is whether the contract was executed—whether the title passed, or it was an agreement for a future sale. The court examines the rule of law, and holds that in this case of a contract of sale of saw-logs at various points in the stream down which they are to be floated, it was a sale in present, because it was a sale of all the logs at prices fixed by the agreement, and nothing remained for the vendors to do; the amount to be ascertained by a boom-master, whose duty it was to scale the logs. *Leonard v. Davis*, 1 Black, 476... ..553.
7. Nor was this principle affected by the fact that the logs were to be raised upon the boom and scaled at various times. *Ib.*

#### CORPORATIONS.

1. At the common law a franchise, as of a corporation to construct a canal and take toll, cannot be sold under execution. *Gue v. Tide Water Canal Co.*, 24 H. 257..... 108.
2. No statute exists in the State of Maryland which authorizes such a sale. *Ib.*
3. The franchises of the Tide Water Canal Company were granted that the public might be benefited by the facilities afforded for transportation and carriage; and a sale under execution of the canal locks, wharf, toll-house, &c., which, without carrying the franchise, destroys the utility of the canal to the public, and seriously impairs the rights of other creditors, will be enjoined by a court of equity. *Ib.*
4. If a judgment creditor has a right to enforce a sale of such property for payment of

- his debt, his remedy is in a court of equity, where the rights and priorities of all the creditors and the public can be protected, and the property of the corporation disposed of to the best advantage for the interest of all concerned. *Ib.*
5. Where a charter declared that four persons, whose names are given, and such other persons as may be associated with them, are hereby incorporated and made a body corporate, and it is further declared that, until the first election of directors, those named shall have full power and authority to exercise all the corporate powers of the company, it is held that, after these four have accepted the charter, they can purchase and receive title to land as contemplated in the charter, notwithstanding no stock has been subscribed, or election held, or other person has joined the corporation. *Frost v. The Frostburg Coal Co.*, 24 H. 278.....118.
  6. On their organization and acceptance of the charter, they constitute the corporation, and can exercise its powers. *Ib.*
  7. Where a municipal corporation is required by law to perform certain duties for the general interest, as to build bridges and the like, and is furnished with the necessary means and authority to perform the duty well, they are responsible for injuries arising from the neglect of such duties. *Weightman v. The City of Washington*, 1 Black, 39.....349.
  8. A like responsibility exists for carelessness and neglect in the manner of performing such duties. Hence, when the corporation of Washington built a bridge so unskillfully, negligently, and carelessly that it fell and injured a passenger over it, the city is responsible in damages for the injury he sustained. *Ib.*
  9. A provision inserted in articles of incorporation of a banking company, exempting its stockholders from individual liability, and which is nothing more than the banking law, under which it was organized, provided, receives no additional force as a contract by reason of the article in the incorporation. *Sherman v. Smith*, 1 Black, 587 .....625.
  - 10 A reservation in the act under which these articles were framed and accepted, of a right to repeal or modify the act, authorizes a repeal of the individual exemption claim, at least as to debts created after the passage of the repealing act. *Ib.*
  11. A statute making the stockholders individually liable for debts created after its passage does not, in such case, impair the obligation of any contract, within the meaning of the federal constitution. *Ib.*
  12. If the seal of a corporation was affixed to an instrument requiring its seal as a mortgage, without proper authority, but surreptitiously, then the deed is not the deed of the corporation, and it is not a legal and valid mortgage. It must have been affixed by some one duly authorized. *Kochler v. The Iron Company*, 2 Black, 715.....911.
  13. When it is proved affirmatively that neither the president nor secretary of the company, who are the rightful custodians of the seal, had any knowledge of the seal being affixed, the burden of proof to show its rightful use is on the holder of the mortgage. *Ib.*
  14. The laws of Wisconsin require a deed to have a seal to make it valid as a conveyance of real estate. *Ib.*
  15. A decree cannot be rendered foreclosing such an instrument as an *equitable* mortgage on a bill which sets the instrument out as a valid legal mortgage. *Ib.*
  16. Under an order made by the stockholders, authorizing the directors to borrow money for the general use of the corporation, a few of the directors got together, without notice to the president or secretary, and made a mortgage to secure existing indebtedness of those directors; such a mortgage held to be a fraud upon the corporation, and in violation of the trust conferred on the directors, and, therefore, void. *Ib.*

See EQUITY, 6, 7, 8.

## COURT AND JURY.

1. A city cannot lay out a street or highway in the water of the ocean, and if there is no evidence of such an attempt, or of dedication of a vacant space between two

- wharves by the city, it is right in the court to say so to the jury. *Richardson v. Boston*, 24 H. 188.....65.
2. Where, assuming that all the testimony adduced by one or the other party is true, it does or does not support the issue in which it was offered, it is the duty of the court to declare this clearly and directly, and a refusal to do so is error. *Chandler v. Von Roeder*, 24 H. 224.....87.
3. Hence, when, under the Texas statute of limitation, the documentary evidence offered to show color of title was fatally defective, in showing no pretense of derivation from government, it was the duty of the court to instruct the jury that no such color of title had been shown as would support the plea of the statute. *Ib.*
4. It is not error for the court to say to the jury that, if they believe the testimony of a witness, certain results follow, though that witness be contradicted by others. *Russell v. Ely*, 2 Black, 575.....837.

JURISDICTION CIRCUIT COURT, CRIMES, 2, 3; LIMITATION, 3; PRACTICE IN CIRCUIT COURT, 8; RES JUDICATA, 5; RIPARIAN RIGHTS, 8.

#### CUSTOMS DUTIES.

1. Where the question was of the appraisement of concentrated molasses, the appraisers were right in assessing it at its market value where produced, as affected by an export duty, whether that duty was paid in this case or not. *Belcher v. Linn*, 24 H. 508.....246.
2. The appraisement is conclusive of the nature of the article, and of its market value in the place from whence it was imported. *Ib.*
3. No deduction is to be made for leakage from the quantity entered at the customhouse, notwithstanding any deduction for appraisement. *Ib.*
4. Barrels sent empty from the United States and returning to their owners filled with molasses do not return in the same condition in which they were exported, within the meaning of the act of congress; and their value should therefore be assessed in the computation of duties on imported molasses. *Knight v. Schell*, 24 H. 526.....254.
5. After the act of 1839, (5 U. S. Stats. 348,) no action could be maintained against a collector of customs for the exaction of excessive duties, after the money had been paid into the treasury, until the act of 28th of February, 1845. *Curtis v. Fiedler*, 2 Black, 461.....764.
6. Under this act the right of action was made to depend upon a protest which gave the officer notice, which protest must be made at or before the payment of duties. *Ib.*
7. Such a protest was designed to inform the officers that the claim would be asserted against them for the excessive duty, and of the reasons for which it was supposed to be an improper levy, and if it did not do this it was insufficient. *Ib.*
8. Therefore, where a protest was made against duties on hemp and iron, both in one entry, because "there exists no law authorizing the exaction of said duty," when in fact it was only the amount of duty on the hemp which was in controversy, the protest is insufficient, and the action cannot be sustained. *Ib.*

#### DECISION OF STATE COURT AS RULES OF PROPERTY.

Where this court has made a decision affecting title to real estate, and the highest court of the State in which the contest was had subsequently decides the law of that State to be well settled otherwise, this court will, in another case coming before it after this, follow the State decisions instead of its own, where the question is identical. *Suydam v. Williamson*, 24 H. 427.....211.

#### DIVISION OF OPINION, CERTIFICATE OF.

1. It was not the intention of the act of 1803 to give jurisdiction of matters of mere practice or sound discretion in the circuit court of which this court could not take jurisdiction by writ of error. *Wiggins v. Gray*, 21 H. 303. ....138.



2. Therefore, a question as to whether the circuit court could, on motion, set aside a decree of a former term, cannot be so removed, because it lies in the discretion of the court to entertain the motion, or require a resort to regular petition or a new bill. *Ib.*

See JURISDICTION OF SUPREME COURT, DIVISION OF OPINION, 1, 2, 3, 4, 5.

## EJECTMENT.

1. A plaintiff in ejectment can sue together all who are trespassers on his tenement. If they plead separately as to specific parcels or pieces of the land, those who so plead in effect disclaim as to the rest, and are entitled to a separate verdict. Those who join in pleading the general issue are guilty, unless they show a defense as to all the land sued for, and a general verdict is good against them all. The form of pleading by petition instead of the old legal fiction does not change these principles governing the nature of the action. *Greer v. Mezes*, 24 H. 268.....114.
2. In Maryland the action of ejectment can only be sustained by a strict legal title in plaintiff. *Smith et al. v. McCann*, 24 H. 398.....194.
3. If he has only an equitable title, he must resort to a court of chancery. This is the law of Maryland, and in such cases the local law governs this court. *Ib.*
4. The act of 1810 of that State, which authorized the sale of an equitable interest in land, did not convert that interest into a legal title in the hands of the purchaser. *Ib.*
5. When a deed is offered in support of his title by plaintiff, which on its face makes the grantee the holder of the naked title as trustee for another, he cannot prove by parol evidence that the declared trust was a fraud, and the beneficial interest was in the grantee. *Ib.*
6. If the trusts declared in the deed were fraudulent, the plaintiff's remedy was in a court of equity, where the *cestuis que trust* and all others interested could be heard, and in this mode only could complete justice be done. *Ib.*
7. Notwithstanding a statute of Texas, which declares head-right certificates which have been located sufficient to maintain actions of ejectment, they are still but equitable titles; and that statute cannot change the rule of the federal courts that such actions can only be sustained on a legal title. *Fenn v. Holme*, 21 How. 481, (3 Miller, 111,) re-affirmed. *Shierburn v. De Cordova*, 24 H. 423.....209.

See CALIFORNIA LAND GRANTS, 3, 17.

## EQUITY.

### — GENERAL PRINCIPLES.

1. Where a statute of a State gives a lien for work on the streets against the adjoining lot owner, though it may give a specific mode of enforcing that lien, a court of the United States will enforce such lien in a court of equity, as the one appropriate to its jurisdiction. *Fitch v. Creighton*, 24 H. 159.....45.
2. The party defeated in an action at law, the judgment in which has been affirmed on writ of error to this court, cannot resort to a court of chancery to contest the relative merits of the legal title involved in that suit. *Ballance v. Forsyth*, 24 H. 183.....62.
3. His claim for improvement in the lots recovered by the judgment at law is so vague and unsatisfactory that the bill was rightfully dismissed by the circuit court. *Ib.*
4. Where two creditors, by simple contract, file a bill against their debtor and his assignee, to set aside the assignment as fraudulent, and other creditors come in and are afterwards made co-complainants, those first filing the bill obtain no priority over the others in the distribution of the property subject to the bill by decree. *Day v. Washburn*, 24 H. 352.....168.
5. In the absence of a lien by judgment or otherwise the rule of equity in such case is equality. *Ib.*
6. The statutes of mortmain and the limitations of grants in perpetuity in England did not permit valid grants to corporations for charitable uses which were practically inalienable. *Perrin v. Carey*, 24 H. 465.....231.

7. But this was relaxed in favor of charitable bequests, and there is nothing in the statutes of Ohio which forbids such gifts and bequests; and though the act of 43 Elizabeth, chap. 4, is not in force in Ohio, the court of chancery has jurisdiction of charitable bequests, as the court had in England independently of that statute. *Ib.*
8. The city of Cincinnati, as a corporation, had the capacity to receive a bequest, for the purpose of establishing colleges for boys and girls, and administering the trust. *Ib.*
9. These devises are charities in a legal sense, and may be enforced in a court of equity without the aid of legislation by the State of Ohio. *Ib.*
10. There is no uncertainty in the will of McMicken as to who shall be the beneficiaries of this charity; and his selection of his relatives, as entitled to preference in the colleges, was a valid exercise of his right in making the bequest. *Ib.*
11. A stockholder in an incorporated company, being dissatisfied with the management, agrees to sell out his stock at its fair value, to be ascertained by an examination into the affairs of the company, its books, accounts, &c.: Held, that under an allegation that he had been imposed upon and defrauded, by concealment and misrepresentation while making that examination, a court of equity has jurisdiction to grant appropriate relief: *Hager v. Thompson*, 1 Black, 80.....373.
12. But in such an allegation it is incumbent on the plaintiff to establish it by satisfactory proof, especially when, as in this case, it is shown that he was reasonably well aware of the sources of information, and asked for none which was not furnished to him. *Ib.*
13. The transaction in this case does not stand upon the ground of a settlement between debtor and creditor, which is only *prima facie* evidence of its correctness, but is a case of the consideration paid by purchaser to vendor; and the complainant has wholly failed to show fraud, concealment, or any other matter to impeach the transaction. *Ib.*
14. An agreement between two to obtain a pre-emption entry of the public lands by a simulated settlement which was a fraud on the land office, cannot be the foundation of a suit in equity by a party claiming under this contract to get a decree for the legal title. *Harkness v. Underhill*, 1 Black, 316.....479.
15. Where one of the parties to the fraudulent agreement does afterwards make an actual and *bona fide* settlement, and claims a pre-emption right under it, the land office was right in setting aside the first and fraudulent entry in favor of his claim. *Ib.*
16. A bill in equity brought by a purchaser of the first claim, sixteen years after the patent was issued under the second, and accompanied with possession in the hands of a subsequent purchaser, comes too late. *Ib.*
17. Van Pelt, who resided in California, having directed Vanderbilt, as his agent, to contract for and superintend the building of a vessel in New York, with instructions to make all the contracts in the name of the agent, and to act as her owner generally, died while the vessel was in process of construction. Though he and his administrator furnished the money to pay for the building of the vessel, Vanderbilt took the builders' certificate in his own name, and had her enrolled in his name at the custom-house, and sold her to appellants for full value: Held by the court, that all this having been done at Van Pelt's request, to hide his interest in the vessel, and the same course continued by his executor, the appellants finding him in possession of the vessel, with all the documentary evidence of a good title, had a right to buy of him, and would take a good title, unless they had notice of the equitable title in Van Pelt's administrator. *The Calais Steamboat Co. v. Van Pelt's Administrator*, 2 Black, 372.....704.
18. The fact that the administrator, after the death of Van Pelt, sent another agent to New York, though whom the money was paid for the work and materials, but who did not interfere with Van Pelt, does not change the state of affairs. *Ib.*
19. The purchasers paid full value, bought of the person who had the legal title, and deny all knowledge of any defect in his title or his right to sell under oath; and

- though the contested point in the case, the proof fails to establish such notice of the interest of Van Pelt's estate as to impeach the fairness of the purchase. *Ib.*
20. The burden of proof in this matter was in complainants below, and they have failed to sustain the allegation. *Ib.*
21. The appellant, who is the owner of a water-power, alleges in his bill that defendants, by controlling the supply from Lake Winnepiseogee, and regulating its flow, have seriously injured his right in the water-power described, but does not state clearly in what that injury consists, nor does the evidence very clearly establish that there is any serious injury. *Parker v. Winnepiseogee Company*, 2 Black, 545.....813.
22. The bill does not allege an irreparable injury, or necessarily protracted litigation, or multiplicity of suits, as ground for equitable interference, nor any obstruction to an assertion of his rights by an action at law. *Ib.*
23. Under these circumstances this court holds that the circuit court was right in refusing any injunction or order to treat the acts of defendants as creating a nuisance until plaintiff has established his right by an action at law. *Ib.*
24. Where a defendant in a mortgage foreclosure suit agreed with the plaintiff to have a sale earlier than the original decree allowed, for the purpose of defeating other mortgage creditors on part of the land in collecting their debts, a court of equity will not enforce, against the plaintiff and purchaser, under such a sale, that part of the agreement by which the mortgagee could hold the land for payment of his debt, notwithstanding the sale. *Randall v. Howard*, 2 Black, 585.....844.
25. Such an agreement is a fraud on third persons which a court of equity will not enforce in favor of either party. *Ib.*
26. A person who agrees to act as agent to pay taxes for another, and enters upon that duty, cannot, without notice, change his relation and buy in the property at the tax sale for himself, and thereby obtain a valid title. A title so obtained enures in equity to the benefit of the principal whom he represented. *Rothwell v. Dewees*, 2 Black, 613.....865.
27. Where two devisees or tenants in common hold under an imperfect title, and one of them buys in an outstanding title, such purchase will enure to the benefit of all the tenants, upon contribution on their part to repay the purchase money. *Ib.*
28. This principle applies as forcibly to the husband of a *feme* tenant in common who buys in the outstanding title or incumbrance as to one of the immediate co-tenants. *Ib.*
- See CALIFORNIA LAND GRANTS, 15, 18, 35, 36, 37; CORPORATIONS, 1, 2, 3, 4, 15, 16; EJECTMENT, 2, 3, 4, 5, 6, 7; FRAUD, 2, 3; LAND TITLES, 13, 15, 16; LIMITATIONS, 4, 5.

— PRACTICE.

1. A bill is not multifarious, because it joins in the same bill assessments against the same person on account of different lots made at different times. *Fitch v. Creighton*, 24 H. 159.....45.
2. When the contract has solely been performed by one of two original contractors to do the work, and the city has assessed the amounts in his favor, the other contractor is not a necessary party to a suit to enforce the lien. *Ib.*
3. An exception to a master's report need not be as full and specific as a special demurrer. All that is required is that it shall distinctly point out the finding and conclusion of the master which it seeks to reverse. This brings up all the questions of law and fact on that subject mentioned in the report. *Foster v. Goddard*, 1 Black, 508.....573.
4. When a party who holds two bonds out of two hundred, secured by a first lien on the canal, brings his suit in behalf of himself and other bondholders of the same class who are not named, it is error to decree a sale of the property for those two bonds and make no provision for the rights of the other outstanding bondholders. *Trustees Erie and Wabash Canal v. Beers*, 2 Black, 448.....754.

5. For this latter reason the decree is reversed, with directions to enter a decree providing for all the bondholders of that class, with a reference to a master to inquire who they are, and, if unknown, to advertise for them to come in and share in the proceeds of the sale on paying their due proportion of the costs of the litigation. *Ib.*
6. The remedy for the abatement of a public nuisance by bill in equity by a private person has succeeded the remedy by information, and is in many respects to be governed by that remedy and the remedy by indictment. *The Mississippi and Missouri R. R. Co. v. Ward*, 2 Black, 485.....772.
7. But no private individual can sustain the bill who does not show that he suffers a private and special injury beyond that of the public; and therefore he need not make parties those who suffer a like injury. *Ib.*
8. Nor is it necessary for its abatement, when the action is against the person who maintains the nuisance, to make parties of all who may be interested in the structure, (as a bridge.) *Ib.*
9. By the rule of the chancery court of England, in a suit for foreclosure of mortgage there can be no decree for the payment of any balance of the mortgage debt after the sum realized from the sale of the mortgaged property, and the federal courts pursue that practice. *Noonan v. Lee*, 2 Black, 500.....780.
10. Therefore a decree for execution for such balance on the report by the master is erroneous, and must be reversed. *Ib.*
11. Where a bill alleges facts which go to show that a city is about to inflict an irreparable injury to plaintiff's lots, and alleges that they are proceeding without authority of law, a demurrer to the bill for want of equity should not be sustained. *Griffing v. Gibb*, 2 Black, 579.....795.
12. If defendants rely on the authority of an act of the legislature, the defense should be made by plea or by answer, and not by demurrer. *Ib.*
13. In a suit between proper parties in a court of equity to adjust among themselves the equitable title or interest in real estate, a third person, whose title, if he has any, is strictly legal, and is adverse to all the other parties, cannot intervene in such suit, where there is no obstruction to the assertion of his title in a court of law. *Rothwell v. Dewees*, 2 Black, 613.....865.
14. The trustee for the creditors of an insolvent firm holds no such fiduciary relation to the heirs of one of that firm as to enable the latter to sue in equity. *Ib.*
15. Nor do purchasers from said heirs, who are parties to the original bill, stand in any different attitude. *Ib.*

See GENERAL PRINCIPLES, 3, 4, 19, 20, 22; JURISDICTION CIRCUIT COURT, AS TO TERRITORIAL LIMITS, 4.

—— STATUTORY LIEN.

1. The loans contracted for the benefit of the Wabash and Erie Canal Company by the State of Indiana, under the several acts of her legislature of the years 1832, 1834, and 1836, by which acts the canal and its revenues were pledged for the payment of these loans, are liens on said canal and its revenues, with priorities according to the dates of these respective statutes. *Trustees Erie and Wabash Canal v. Beers*, 2 Black, 448.....754.
2. These loans and the liens created by those statutes are contracts within the meaning of that word in the federal constitution; and it was not in the power of the legislature of Indiana to repeal or impair these obligations. *Ib.*
3. Nor did the legislature of Indiana intend, by anything found in the act of January 19, 1846, and the supplementary act of 1847, by which the State made propositions for settlement with her creditors, to deny or impair the obligation of those liens and their respective priorities as here declared. *Ib.*
4. The option given by these acts to accept the certificates of the State under that act in lieu of any class of those liens, was a purely voluntary matter on the part of the

creditor; and his acceptance of the State's offer as to one class of obligations did not work a waiver or forfeiture of any obligation he might hold of another class. *Ib.*

5. Nor was he under any such relation to other creditors of the State that it was inequitable in him to accept the State's offer as to bonds with insufficient or doubtful security, and retain his lien as to other bonds when he thought his security sufficient. *Ib.*

#### EVIDENCE.

1. The volumes of the American State Papers, three of which were published by Duff Green, under the revision of the secretary of the senate, by order of the senate, contain authentic papers which are admissible as evidence without further proof. *Gregg and Ballance v. Forsyth*, 24 H. 179.....58.
2. A record of a suit in partition, resulting in a decree, and sale under it, are admissible in evidence against persons not claiming under that title, notwithstanding irregularity in the conduct of the case or in the sale. Third persons cannot assail it for these reasons. *Ib.*
3. In a suit by a slave for freedom, a record of a former suit between the mother of the plaintiff and the present defendant establishing the freedom of the mother is competent evidence. *Vigel v. Naylor*, 24 H. 208.....79.
4. This is rendered more presumptive by parol testimony showing that the mother and child, when young, were in the possession of defendant, and were carried from the house of Kirby, by whose will all his slaves were manumitted, and under which the mother received freedom. *Ib.*
5. The docket entries of the courts of Maryland and of the courts of the District of Columbia are to be received as records of those courts in evidence of what those entries purport to establish. *The Steam Packet Co. v. Sickles*, 24 H. 333.....157.
6. The principle decided in a previous case is the principal one in this, namely, that a plaintiff who by the law of Ohio is a competent witness in his own behalf, is also a competent witness in the federal courts sitting in that State. *Hausknecht v. Claypool et al*, 1 Black, 431.....533.
7. Though it would have been the better practice to have shown by the bill of exceptions that his testimony would have been material, this will be presumed when it is shown he was rejected for incompetency as a party.
8. In a libel for repairs, where the defense was that the libelants were joint owners of the vessel with respondent, his conduct in claiming and using all the proceeds of the sale of the vessel in another suit is conclusive as to his ownership. Other testimony concurs to the same effect. *Turner v. Flanagan*, 1 Black, 491.....565.
9. Evidence that plaintiff, who had suffered the injury, was a physician in large practice, and that it occurred at a period of the prevalence of much sickness, is admissible on the question of damages. *Nebraska City v. Campbell*, 2 Black, 590.....848.

See APPEALS AND WRITS OF ERRORS, 2; CUSTOMS DUTIES, 6; EJECTMENT, 5; MRS. GAINES' CASE, 7, 8; PRACTICE IN CIRCUIT COURTS, 6, 9; RES JUDICATA, 6, 7, 8, 9, 11, 13; RIPARIAN RIGHTS, 12, 13, 14.

#### EXECUTIVE DEPARTMENTS.

1. The decisions of the register and receiver of the land office, under the act of May 8, 1822, concerning lands west of the Perdido river, are not conclusive of the facts on which they act. *Tate v. Carney*, 24 H. 357.....170.
2. Such receivers have no right to reconsider and annul certificates granted by their predecessors many years before, under which the land has been held in possession and *bona fide* titles acquired. *Ib.*
3. A certificate and patent, on such second decision, which reserves the rights of the claimant under the first certificate, leaves open the question of right in the matter under the two claims. *Ib.*

## EXECUTORS AND ADMINISTRATORS.

1. The lapse of thirty years, without evidence of a claim for money loaned a decedent with failure to present it as a claim against his estate, are sufficient, in the absence of satisfactory evidence, to justify the rejection of the claim. *Rogers v. Law's Executors*, 1 Black, 253.....458.
2. Where, in an ante-nuptial agreement, the husband covenants with the trustees to secure to his intended wife a sum equal to that which his wife has from her father's estate, when this shall be realized and ascertained, the husband's estate is not liable on this covenant after his death, unless it is shown what was realized and received by the trustees for the wife from her father's estate, and this in money, and not by a valuation or appraisement of property. *Ib.*

## FERRY RIGHT OVER OHIO RIVER.

1. By virtue of ownership of the soil on the Kentucky shore of the Ohio river, and grant of a ferry right under the authority of the State of Kentucky, the defendants in error had, under repeated decisions of the highest court of Kentucky, an exclusive ferry right from the city of Newport, in Kentucky, to the opposite shore. *Conway v. Taylor's Executor*, 1 Black, 603.....633.
2. This right being invaded by a rival company, with no other license than one from the State of Ohio and a coasting license for their vessel from the United States, was rightfully enjoined by the State court from interference with the rights of defendants. *Ib.*
3. Though the State of Kentucky may not hinder the exercise of the right of ferriage from the Ohio shore, it may give and protect the exclusive right of ferriage from the Kentucky shore. *Ib.*
4. The right of a vessel licensed under the laws of the United States to land at all customary landings on the Ohio river in the usual pursuit of commerce is not and cannot be denied. *Ib.*
5. But the exercise of this right is not inconsistent with an exclusion from the right of using such a vessel in the ordinary business of ferrying goods and passengers across the river between two points for pay. *Ib.*
6. Such an exclusion is no violation of the right of congress to regulate commerce between the States, nor of any right conferred on a vessel under the laws for securing vessels in the coasting trade. *Ib.*

See ADMIRALTY, LIABILITY OF OWNERS, 1, 2, 3.

## FRAUD.

1. The fourth section of the act of March 31, 1830, was intended to protect the government against secret and fraudulent combinations of bidders for the public lands, and the fifth for the protection of *bona fide* bidders, or those who intend to bid, against such practices. *Fackler v. Ford*, 24 H. 322.....152.
2. Neither of them can be used by a purchaser at such sales to defraud the party from whom he received the money to bid, and to whom he made a fair contract to convey a part of the land so purchased. *Ib.*
3. Such fraud, if practiced by the purchaser, is no defense against the performance of an honest contract with another person. *Ib.*
4. In the absence of special legislation, a general creditor cannot bring an action on the case against his debtor, or those combining and colluding with him, to make dispositions of his property, although the object of those dispositions be to hinder and delay creditors. *Adler v. Fenton*, 24 H. 407.....200.
5. The owner of property has the absolute right to sell and dispose of it; and where a creditor has no judgment or other lien or claim on it for his debt, the motive with which it was sold and bought gives him no right of action. If injured, it is *damnum absque injuria*. *Ib.*

6. Hence, where a creditor whose debt was not yet due sued his debtor and others for a conspiracy to defraud him by the disposition of the goods for which the debt was created, he cannot recover, though he proved that the purpose of the debtor and the purchaser from him was to defraud the plaintiffs and to hinder and delay creditors. *Ib.*

See *EQUIRY*, 11, 14, 15, 24, 25.

#### GAINES' CASE. MRS.

1. Since the previous suits decided in this court against the present appellant, claiming as heir of Daniel Clark, the will of said Clark of 1813 has been proved and established as his last will and testament by the judgment of the supreme court of Louisiana. *Gaines v. Hennen*, 24 H. 553.....274.
2. The propositions of law and the view of the evidence taken by that court has the concurrence of this court, and are in accordance also with the common law. *Ib.*
3. This being a suit to recover of the defendant, Hennen, the real estate devised by that will to plaintiff, the executors of the will of 1811, and Mary Clark, the devisees of that will, were not necessary parties to the suit. Nor was it necessary to enable plaintiff to assert her rights under the will of 1813 that the probate of the former will should have been formerly set aside by order of the court. *Ib.*
4. The defendants do not by their evidence establish their defense of *bona fide* purchasers for value without notice, but the contrary is proved. *Ib.*
5. The plaintiff is not barred by the prescription of ten years as to vacant estates, because here there was no vacant succession, nor by the twenty or thirty years' prescription, because the plaintiff, being a minor until 1828, commenced suit in 1836; and though several of her suits have failed, she has never voluntarily abandoned but has continuously litigated the matter from that time to the present. *Ib.*
6. The decision of this court in 12 How. 537, was not intended to and did not overrule the decisions in 6 How. 583, that there had been a lawful marriage between Clark and plaintiff's mother, and that she was the legitimate child of that marriage. *Ib.*
7. The decision in 12 How. is not a bar to this suit, because the suit is between different parties; because plaintiff claims now under the will since established; and because she claims the whole and not a part of the estate of Clark. *Ib.*
8. The paper from the Cathedral of Christ of New Orleans to show the validity of the marriage of plaintiff's mother with Des Grange, prior to her marriage with Clark, is incompetent evidence, and must be rejected according to the Spanish law, which is examined at great length. *Ib.*
9. The plaintiff is the legitimate offspring of a lawful marriage of the testator to her mother. *Ib.*
10. If the mother was in fact incapable of marriage, by reason of a lawful husband then living, still the father being imposed upon and deceived, the child of that marriage is not incapable of taking by will or inheritance from her father under the law of Louisiana. *Ib.*
11. This court is of opinion that the evidence in the case establishes the actual marriage of Daniel Clark, the father of plaintiff, to her mother, and that such marriage was in good faith on both sides, and certainly so on the part of Clark. See *Gaines v. New Orleans*, 6 Wall. 642. *Ib.*

#### INDIANS.

1. A reservee under the treaty with the Pottawatomie Indians of 1832 has an inchoate equitable title to the land reserved, and though its locality is only ascertained after the president shall have located and designated it, it is still subject of valid sale and assignment by the reservee. *Crews v. Burcham*, 1 Black, 352.....499.
2. When the patent issues in such case to the reservee from the United States during the life of the grantee it inures to the benefit of his assignee or grantee, and if after his death, the same result follows, under the act of May 20, 1836. 5 U. S. Stats. 31. *Ib.*

3. Though the legal title be in complainant in a bill in chancery, it can be maintained to quiet title, to relieve it of clouds, and to prevent multiplicity of litigation. *Ib.*
4. The question whether the land as patented lies within the original treaty lands, cannot be raised by any one but the United States. *Ib.*
5. Purchasers from the heirs of the reservee cannot claim to be innocent purchasers without notice when the deed of reservee was on record. *Ib.*
6. *Doe et al. v. Wilson*, 23 How. 457, (3 Miller, 654,) commented on and explained. *Ib.*

#### INLAND NAVIGATION.

See ADMIRALTY, LIABILITY OF OWNERS, 1, 2, 3.

#### JURISDICTION.

##### — CONFLICT BETWEEN STATE AND FEDERAL COURTS.

1. Where an officer of a federal court seizes personal property under the writ of that court, the property is in the custody of the court, and cannot be lawfully seized or taken from his possession by the process of any other court. *Freeman v. Howe*, 24 H. 450.....222.
2. Hence, where a United States marshal had possession of property by virtue of a writ of attachment, it cannot be taken from his possession by a writ of replevin issued from the State court. *Ib.*
3. Nor does the fact that the replevin suit was brought by one not a party to the first suit, on the ground that his property was seized for the debt of another person, lead to a different result. *Ib.*
4. The case of *Taylor v. Carryl*, 20 How. 583, (2 Miller, 616,) did not rest, as is now argued, upon anything peculiar to the jurisdiction of admiralty courts, but upon the broad proposition that, by a principle of comity, no court can take from another of concurrent jurisdiction property in its possession or control. See *Buck v. Colbath*, 3 Wall. 334. *Ib.*
5. Where property of A is wrongfully seized under a writ of attachment against B, as is asserted in this case, the proper mode of relief in the federal courts is by a petition of the rightful owner for its release. Such a petition will be heard and relief granted without regard to the citizenship of the parties. *Ib.*
6. The circuit court of the United States, sitting in equity, has not jurisdiction to set aside a sale and deed made by order of a State court in a prior suit between the same parties. The remedy, if injustice has been done, is by petition to the State court. *Randall v. Howard*, 2 Black, 585.....844.

#### JURISDICTION CIRCUIT COURT.

##### — AS TO TERRITORIAL LIMITS.

1. The circuit and district courts of the United States are, in local matters of this kind, limited to the lines of their territorial jurisdiction, as they would be in case of indictment; and the jurisdiction of the federal courts of Iowa and Illinois are bounded and separated by the middle of the main channel of the Mississippi river. *Mississippi & Missouri R. R. Co. v. Ward*, 2 Black, 485.....772.
2. In this suit to abate a railroad bridge across the Mississippi river, brought in the district court for the district of Iowa, it does not clearly appear that the portion of the bridge west of the middle of the main channel is a nuisance by reason of its obstruction to navigation. *Ib.*
3. The main pier of the bridge in the middle channel, which is charged to constitute the bridge a nuisance, by reason of its standing diagonally across the arms of the current, is on the Illinois side, and not within the jurisdiction of the Iowa district. *Ib.*
4. As the court of chancery in this case, like a jury in an indictment case, can only relieve on clear and satisfactory proof of the nuisance within its jurisdiction, the de-



creed of the court directing the removal of the bridge east of the middle of the main channel cannot be sustained, and each party is ordered to pay his own costs.

——— CITIZENSHIP.

1. It is the settled doctrine of this court that a suit by or against a corporation, in its corporate capacity, is a suit by or against citizens of the State which created it; and no averment to the contrary will be heard to defeat the jurisdiction of the circuit court. *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 Black, 286.....470.
2. It follows that a statement in the declaration that plaintiff is a corporation created by the laws of the States of Ohio and Indiana, implies a suit in which plaintiffs are citizens of both those States. *Id.*
3. It also follows that no such suit can be maintained in the circuit court for the district of Indiana against a citizen of that State. *Id.*

——— CRIMES ON THE HIGH SEAS.

1. The circuit courts of the United States can have no jurisdiction of an offense committed within the limits of another district, but may have jurisdiction of offenses on the sea not within the limits of any other district where the offender is first brought within the limits of the district where he is tried. *United States v. Jackalow*, 1 Black, 484.....580.
2. The question whether a particular place where the offense is committed is within the boundaries of a stated district, is a question of fact to be determined by a jury, under such instructions as the court may give in construing the legal description of the boundary. *Id.*
3. A special verdict which does not find whether the offense was committed within or without the jurisdiction of a stated district, is not sufficient to authorize a judgment. *Id.*

JURISDICTION OF SUPREME COURT.

——— AMOUNT IN CONTROVERSY.

1. Where a decree was rendered for over \$2,000. with leave to defendant to reduce it by an offset of their claim for freight, and they appeared in court and did make set-off, by reason of which a new decree was rendered against them for less than \$2,000, the right of appeal is governed by this latter decree, and is not saved by a formal statement of the defendant that he does not waive his right of appeal by making the set-off. *The Ship Sarah*, 24 H. 207.....78.
2. The appellate jurisdiction of this court over the judgment of the circuit courts depends upon the amount in controversy, to wit, over \$2,000. This implies a suit or judgment which involves a property value. *Pratt v. Fitzhugh*, 1 Black, 271.....487.
3. Therefore, a judgment or order of the court discharging prisoners on a writ of *Habeas corpus* is not a judgment which this court can revise. *Id.*
4. It constitutes no exception to this rule, that the prisoners were held on a writ of *capias* to answer a decree in admiralty of the same court for \$21,581.28. *Id.*
5. A claim to the guardianship of children *in personam*, without any right to control property, is not capable of a moneyed valuation, and under the principle established in *Barry v. Mercein*, 5 How. 103, (16 Curtis, 327,) a judgment of an inferior court in that matter cannot be reversed here. *De Kraft v. Barney*, 2 Black, 704.....909.

——— DIVISION OF OPINION.

1. This court possesses no appellate jurisdiction over the judgments of the circuit courts in criminal cases, except where the judges of the court certify a division of opinion on some matter arising in the trial to this court. *Ex parte Gordon*, 1 Black, 503.....570.
2. No party to a suit has a legal right to have any point so certified, and the judges

would violate their duty to make such a certificate where no division of opinion existed. *Ib.*

3. This court has no power to issue a writ of prohibition in a case where it has no appellate jurisdiction over the court to which the writ must go, nor any special authority by statute. *Ex parte Christie*, 3 How. 292, reaffirmed. *Ib.*
4. Where the judges of the circuit court, after a final hearing in a suit in chancery, certified that they were divided on the question of the jurisdiction of the court over the case, and the judges of the supreme court on the hearing are equally divided on the same question, it must be remitted to the circuit, that the bill may be dismissed, which is the proper course in such case, that the parties may, if they see proper, bring the case here by appeal. *Silliman v. The Hudson River Bridge Co.*, 1 Black, 582 .....622.
5. The court below also certified a difference as to whether in point of fact the bridge was a nuisance; but this being a question of fact, is not one of which this court can take notice on such certification. *Ib.*

See DIVISION OF OPINION, CERTIFICATE OF, 1, 2.

— FINAL JUDGMENT.

1. A judgment of the appellate court of a State reversing the judgment of the inferior court, and sending it back for a new trial, is not such a final judgment as will sustain a writ of error. *Tracy v. Holcombe*, 24 H. 426.....210.
2. A decree which directs the absolute payment of a sum of money into court for the plaintiff is a final decree from which an appeal lies. *The Canal Co. v. Beers*, 1 Black, 54.....356.
3. Where a decree against stockholders of a corporation in favor of creditors directs an equal distribution of assets among them, but appoints a master to collect those assets, and report to the court the amount of all the assets, and a scheme of distribution, there is no final decree from which one class of creditors can appeal as against the other. They must await the master's report and the final order of distribution. *Ogilvie v. The Knox Insurance Co.*, 2 Black, 539.....809.
4. Where, after a sale under a decree in chancery, the purchaser of real estate obtains an order against one in possession, not a party to the suit, to be placed in possession under his purchase, this is not a final decree from which an appeal will lie. *Callan v. May*, 2 Black, 541.....810.
5. It is merely the execution of the decree of the court; and if the party in possession is wrongfully dispossessed, he can have his remedy by bill in chancery, ejectment, or other appropriate remedy. *Ib.*
6. The special allowance of an appeal by a justice of this court is not conclusive on the court or on the judge who allows it. *Ib.*

— OVER STATE COURTS.

1. This court has no jurisdiction to decide whether an act of the State legislature is in conflict with the State constitution on a writ of error to the State court. *Medberry v. The State of Ohio*, 24 H. 413 .....204.
2. Where plaintiffs in error objected to a deed, because the statute which authorized it was unconstitutional and void, it was properly held by the State court that the objection related to the State and not to the federal constitution; and from this decision of the State court no writ of error lies in this court. *Porter v. Foley*, 24 H. 415.....206.
3. The bill of complaint in the State court prayed an injunction, on the ground that defendants were, under claim of acts of congress, doing acts to his injury unauthorized by those acts: Held, that from a decree of the court of appeals of Maryland, affirming the order of the court below, refusing the injunction, no writ of error would lie to this court, because it was only an interlocutory order, no decree having been entered to dismiss the bill. *Reddall v. Bryan*, 24 H. 421.....207.

4. Because the order which was affirmed supported the rights claimed under the act of congress, and did not decide against such a right. *Ib.*
5. Both parties in this suit claiming title under the act of Congress of 1812, confirming titles to village lots and out-lots and commons in Missouri, and under surveys made in pursuance of that act, this court has jurisdiction over the judgments of the supreme court of Missouri in that contested question. *Carondelet v. St. Louis*, 1 Black, 179.....425.
6. Where the power of the secretary of the interior to set aside a survey of a Spanish grant which has been confirmed, and to order a new survey, has been passed upon by a judgment of the supreme court of Missouri, its construction of the powers confided to the secretary by the various acts of congress is open to review in this court. *Maguire v. Tyler*, 1 Black, 195.....431.
7. An act of the legislature incorporating the members of a church into a body politic, with rights of property, does not on its face impair the obligation of any trust under which the land and meeting-house was originally granted. *The Attorney General v. Federal Street Meeting-House*, 1 Black, 262.....463.
8. Nor in this case does it appear by any averments in the bill or the decree of the court dismissing it, or by anything else in the record, that such a question was raised or decided by the State court, to which this writ is directed, and it must therefore be dismissed. *Ib.*
9. In a writ of error to a State court jurisdiction does not exist here unless it appears that the point relied on was raised and decided in the State court; that its attention was called to the particular clause of the constitution of the United States on which the party relied, and to the right he claimed under it; and that with the question thus directly presented, the decision was against him. *Farney v. Towle*, 1 Black, 350.....498.
10. The defense to a mortgage foreclosure suit in a State court was, that to part of the land for which the mortgage was given the plaintiff had no title, because the land for which he had a patent from the government had been assigned to an Indian under the treaty. This gives no jurisdiction, because the decision was in favor of the title set up under the United States. *Verden v. Coleman*, 1 Black, 472.....551.
11. The claim of the Indian's right under the treaty can only give jurisdiction when assailed by some one claiming under it, and not when set up by a stranger. *Henderson v. Tennessee*, 10 H. 311, (18 Curtis, 405.) *Ib.*
12. In order to give jurisdiction to this court on a writ of error to a State court, it must appear by the record that the point on which it relies was made in the State court, and that the section of the constitution and the right claimed under it was brought to the notice of the State court. *Hoyt v. Thompson's Executors*, 1 Black 518.....583.
13. It is not sufficient that it appears to the court here now that such a point might have been raised, if its decision rested on other grounds, and this was not called to their notice. *Ib.*
14. Where the plaintiffs in a writ of error to a State court claim adversely to an act of congress, and deny its validity, this court has no jurisdiction to revise the decision, of the State court as to the validity of a sale of lands under the statutes of the State. *Congdon v. Goodmad*, 2 Black, 574.....836.

LAND GRANT, CONSTRUCTION OF.

1. An act of the territorial legislature incorporating a railroad company and granting it lands which congress might thereafter grant to the territory to aid in building such a road, is not a binding and valid grant as against the State. *Rice v. The Railroad Co.*, 1 Black, 360.....502.
2. A grant of lands to a State or territory, for the purpose of building a railroad, which contains a provision "that no title shall vest in said territory, nor shall any patent issue for any part of the lands heretofore mentioned, until a continuous

length of twenty miles of said road shall be completed through the lands hereby granted," is not a grant *in presenti*, and no title passes until the terms are complied with. *Ib.*

3. It is competent for congress to repeal such an act absolutely before any road is built under it, and with the repeal, falls all claims of the territory or any one under her to the lands. *Ib.*

#### LAND TITLES.

1. Prior to 1856, by the laws of Tennessee, a deed could not be acknowledged or proven in another State before the clerk of a court. The act of 1856, which provided that such proof or acknowledgment shall be valid, and that deeds so acknowledged or proved may be registered, and shall be good to pass the title, is prospective only in its operation, and does not cover acknowledgments previously made. *McEwen and Wiley v. Den*, 24 H. 242.....97.
2. The pleas of the statutes of limitation must be governed by the decision of the question whether Evans's coal bank was within grant No. 22,261. The instructions of the court as to the mode of surveying that grant were too vague. The true directions given by this court. *Ib.*
3. Lands withheld from sale until the State had selected those to which she was entitled under the grant of September 20th, 1850, became subject to sale and pre-emption in 1852. *Clements v. Warner*, 24 H. 394.....191.
4. Where C. began a settlement in October, 1852, for which he afterwards claimed and received a certificate of the register and receiver in November, 1856, and a patent for the land, his title is superior to that of W., who paid for and received a certificate of purchase at private sale in November, 1855. *Ib.*
5. There was no statute in the State of Illinois making the blood of bastards heritable until 1829, which was wholly prospective. *McCool v. Smith*, 1 Black, 459.....546.
6. The statute of Virginia of 1785, which provided that bastards could inherit and transmit real estate, was passed after the northwestern territory had been conveyed by Virginia to the federal government, and was, therefore, never in force in Illinois. *Ib.*
7. If the act of the legislature of Illinois of February 16, 1857, can be construed as operating retrospectively, so as to make good previous conveyances by bastards, then, title takes effect as of the date of the act. *Ib.*
8. As the action in this case was commenced before the passage of that act, the plaintiff's title being good only by virtue of it, he cannot recover in *this* action, both by the common law and by the statute of Illinois, because he had no title at the date of its commencement. *Ib.*
9. Although a plat of a town is defective, and not entitled by law to be recorded, and the parties making it are liable to fine, still a reference in a deed to such a plat descriptive of the land conveyed is good, if the land can thereby be identified. *Noonan v. Lee*, 2 Black, 500.....980.
10. A party in possession under a deed for an *undivided half of the land* has not such adverse possession of the whole as would make void a deed by a grantor out of possession. *Ib.*
11. A party in possession of land claiming title to it is bound to pay the taxes; and if he permit the land to be sold for taxes, and buy it in for himself, he acquires no title thereby. *Ib.*
12. The statutes of Wisconsin permit a vendor out of possession to make a valid conveyance; but where such adverse possession is under a superior title, it is equivalent to an eviction and a breach of the covenant of general warranty; but where the paramount title is in the warrantor, it is no breach of the covenant. *Ib.*
13. On a re-examination of the adjudged cases, this court holds that, when a pre-emptor has proved his claim, paid his money, and received a certificate of entry from the proper land officer, the action of the commissioner of the land office in

- setting aside his entry, without notice to him or his heirs, and selling and giving a patent for it to another, does not preclude the party first mentioned from asserting his rights in a court of equity. *Lindsey v. Hawes*, 2 Black, 554.....820.
14. When the government has made a survey of its lands, with a plat which has been approved by the proper officer, and by that survey has sold the land and received the money for it, and given a certificate of purchase, it is bound by the survey and sale, and cannot of its own motion make a new survey, so as to defeat the title it had sold, by showing that the pre-emptor did not occupy the specific congressional subdivision which he had rightfully claimed to do by the first survey. *Id.*
  15. But this is not intended to deny the right of the government to compel payment for any additional quantity of land found to be included in the sale by the new survey. Taking the original survey as furnishing the lines by which plaintiff's occupation and residence on the land he claimed is determined, it is established as a fact that his house was on the dividing line between two quarter sections, one of which he pre-empted. This was a residence in both, and authorized him to select in which he would claim the right of entry, as he had possession of both. *Id.*
  16. The plaintiffs, the heirs of the pre-emptor, are therefore entitled to conveyance of the legal title from the defendants, who hold the legal title by patent from the United States, which equitably belongs to plaintiffs. *Id.*

See CORPORATIONS, 5; EQUITY, 6, 7.

— PEORIA LOTS.

1. Where a claim under the act of 1820, confirmed by the act of 1823, (3 U. S. Statutes 786,) had not been surveyed, or the survey confirmed until 1841, and the defendant claimed under a patent from the United States of March 18, 1837, the court should have instructed the jury that a survey and its approval, made after the issue of the patent to other parties, would not relate back to the act of 1823, and make a perfect title, to the exclusion of the title under the patent. *Hall v. Papin*, 24 H. 132.....35.
2. That under the provisions of the act of 1823 no person could hold more than ten acres confirmed and surveyed to him; and where proof was offered to show that the plaintiffs claimed more than one lot, they should have been limited to one claim, and no more. *Id.*
3. Where a patent from the United States contains a reservation of the rights of all persons claiming under the act of 1823, confirming claims to lots in Peoria, and the plaintiff claims under that act, with a survey made in 1840 and a patent in 1846, the latter, though the junior patent, is the better title. *Gregg v. Tesson*, 1 Black, 150.....407.
4. This court re-affirms the proposition that a patent, though prior in date, which is expressly made subject to the rights of settlers in the village of Peoria, is not paramount to the title recognized when it is established, though by a junior patent. *Dredge v. Forsyth*, 2 Black, 563.....828.
5. But such senior patent may, when the survey has not located the village settler's right, be a color of title under which a person may have such adverse possession as will form the better right under the seven years' limitation law of Illinois. *Id.*
6. A residence on one of several lots or subdivisions, included in his patent, with assertion of claim to the whole, will be construed as adverse possession of the whole, when there is no actual possession under the better title. *Id.*

LIMITATION, STATUTE OF.

1. Where land was entered at the appropriate land office, and a patent issued with a reservation of the rights of persons claiming under the confirmation act of 1823, (3 U. S. Statutes, 786:) Held, that this did not operate to hinder the statute of limitations from running in favor of the patentee as against the right of one claiming a part of the land under the act of 1823, and a survey under it. *Meehan and Balance v. Forsyth*, 24 H. 175.....55.

2. This saving clause cannot be construed as recognizing the existence of a superior title to part of the land, nor prevent possession under it from being adverse to the claimant under the act of 1823. *Ib.*
3. Where a party by himself and tenants have possession of a part of a larger tract included in one patent, and which is subdivided into lots or parcels, it is for the jury to determine under all the circumstances whether residents on one of these lots were actual residents of the lot in controversy. It is not necessary that he should have a house or actual residence on such part of the whole tract to constitute adverse possession. *Gregg and Ballance v. Forsyth*, 24 H. 179.....58.
4. Rogers, the defendant, having been in possession, claiming title in fee, for more than ten years before the commencement of this suit to foreclose a mortgage, is entitled to the benefit of the Wisconsin statute of limitations of ten years, in bills for relief in cases of trust not cognizable at common law, and in all other cases not provided for. Bills to foreclose mortgages come under this statute.\* *Cleveland Insurance Co. v. Reed*, 24 H. 284.....123.
5. The fact that Rogers purchased the mortgagers' interest in the land under a sale in bankruptcy proceedings afterwards, does not make him a trustee, so as to defeat his adverse title or claim already held. *Ib.*
6. But such senior patent is color of title, under which a defendant may set up adverse possession of seven years under the statute of Illinois; and, by the decisions of the State courts of Illinois, possession of part of the land included in this patent, with claim of the whole, will be held to extend to and include the village lot, where no actual possession had been had of that lot by either party. *Gregg v. Tesson*, 1 Black, 150.....407.
7. The fact that plaintiff claimed under a *feme covert* does not prevent the running of the statute, when she joined her husband, who had a life estate, and who could have sued during this time for the possession. *Ib.*
8. A decree of the circuit court dismissing a bill, affirmed, because the defendants had been in the peaceable adverse possession of the premises sued for more than twenty years, which is the statute's limitation in Missouri, and also because the evidence does not sustain the bill on the merits. *Pindell v. Mulliken*, 1 Black, 585.....624.

See Mrs. GAINES' CASE, 4, 5, 6; LAND TITLES, PEORIA LOTS, 5, 6.

#### MALICIOUS PROSECUTION.

1. An instruction in a suit for malicious prosecution that, in order to excuse the defendants, it must appear they had probable cause for the prosecution, or that they acted *bona fide* without malice, is no ground of error as against the plaintiff. *Wheeler v. Nesbitt*, 24 H. 544.....268.
2. So also a charge, that if the arrest was wanton and reckless, and no circumstances existed to induce a reasonable and dispassionate man to believe the party guilty, then the jury ought to infer malice, is favorable instead of prejudicial to plaintiff. *Ib.*
3. Where the warrant is in due form, the presumption is in favor of the magistrate that it issued on sufficient evidence; and if there is probable cause, the magistrate may detain the prisoner a reasonable time for examination. *Ib.*

#### MANDAMUS.

1. It is the well settled doctrine, that in modern practice *mandamus* is nothing more than an action at law between the parties, and is not now regarded as a prerogative writ. *The State of Kentucky v. Dennison*, 24 H. 66.....10.
2. By the 14th section of the judiciary act, the circuit courts are authorized to issue such writs, including *mandamus*, as may be necessary to the exercise of their jurisdictions, and agreeably to the common law. *Knox County v. Aspinwall*, 24 H. 376.....184.
3. Where a judgment is obtained in that court upon bonds and coupons, for which the county authorities are legally bound to levy the necessary taxes to pay them, a writ

of *mandamus* is the appropriate remedy to compel the levy of the tax; and such a writ is according to the course of the common law, and necessary to the jurisdiction of the court rendering the judgment. *Ib.*

4. When the commissioners had due notice, and made defense, the order for the peremptory writ is not erroneous, because no alternative writ had been previously issued. *Ib.*

See CALIFORNIA LAND GRANTS. 19

#### MISSOURI LAND TITLES.

1. The boundary line of the State of Missouri and of the city of St. Louis is the middle of the main channel of that river; and survey No. 404 of school lands of St. Louis, covering Duncan's Island, was rightfully made, though the island was made land since the grant of these lands for school purposes in 1812, and since the incorporation of St. Louis as a town. *Jones v. Soulard*, 24 H. 41.....8.
2. By the laws of Missouri an imperfect title by Spanish concession was the subject of sale and mortgage. *Massey v. Papin*, 24 H. 362.....174.
3. When, therefore, congress confirmed such a claim to the mortgagor or his representatives, though it had once been rejected by the commissioners, it inured to the benefit of the purchaser under the mortgage foreclosure, and not to the heirs of the mortgagor. *Ib.*
4. Under the 3d section of the act of 1832, and the supplementary act of March 2, 1833, concerning Missouri land titles, a claimant under a Spanish grant, who relinquished his claim, had a right to purchase the land as a pre-emptor, at the minimum price of the public lands, whether an actual settler on it at that date or not. *O'Brien v. Perry*, 1 Black, 132.....397.
5. The fact that a town lot had been confirmed to claimants under the act of 1812, which was a part of the land claimed under the act of 1832, did not invalidate his right to purchase under this latter act the whole tract of 640 acres. *Ib.*
6. The commissioner of the land office erred in setting aside the certificate of entry made by the register and receiver to the claimant, and in granting a patent to another purchaser of the land. *Ib.*
7. While it is true, as a general rule, that this error can only be corrected in a suit in chancery, yet where, as in the State courts of Missouri, law and equity are blended in their proceedings, and a party having an equitable defense to an action of ejectment is bound to set it up, this court will, on a writ of error, affirm the judgment of the supreme court of the State which sustains the equitable title. *Ib.*
8. While the title vested in the claimant of private lots which could be identified by possession as to boundaries, it did not and could not vest in the town as to commons, which were vague and uncertain in their boundaries and localities, until surveyed as the act required. *Carondelet v. St. Louis*, 1 Black, 179.....425.
9. Where such survey had been made for the village of Carondelet, and the town authorities had accepted it, and recognized and acted on it in various ways for many years, this fact, when found by a jury, must conclude the city of Carondelet in a contest for more land and a different boundary between her and the city of St. Louis. *Ib.*
10. The secretary has power over surveys to set them aside and order new ones, as preliminary to issuing patents for the land so confirmed. *Magwire v. Tyler*, 1 Black, 195.....431.
11. Where a jury finds that a village lot of St. Louis was a common-field lot, and was cultivated and possessed prior to the year 1803, the title so held is, by the act of June 13, 1812, perfect. *Glasgow v. Hortiz*, 1 Black, 595.....629.
12. That act was a grant *in presenti*; and though provision was made for a survey of the out-boundaries of these common fields, neither the neglect of the surveyor to make it, nor any mistake in it when made, can defeat the title of the holder of the lot under the act of 1812. *Ib.*

13. The map of this survey may be conclusive as between the government and school commissioners or others, but cannot defeat the title of the lot-holder. *Ib.*

#### MORTGAGES.

1. Under the statutes of Wisconsin the legal title does not vest in the mortgagee upon condition broke, nor previously. *Russell v. Ely*, 2 Black, 575.....837.
2. If the mortgagee procures possession of the land mortgaged by a collusive arrangement with the tenant of the mortgagor, and without the consent of the latter, his possession is not lawful, though the debt secured by the mortgage be due and unpaid. *Ib.*

CORPORATIONS, 12, 13, 14, 15, 16.

#### MUNICIPAL BONDS.

1. The act of the legislature of Pennsylvania of April 5, 1849, authorizing subscription to the railroad company, uses the words "certificates of loan," which is synonymous with coupon bonds, and the use of the word bonds in the act of 1852 means the same thing. *Amey v. Allegheny City*, 24 H. 364.....176.
2. Although, by the act of 1850, the statute had prohibited the city of Allegheny from creating a debt exceeding \$500,000, the subsequent act of 1852, authorizing the council to take \$200,000 additional stock in the railroad company, and issue bonds therefor, is to be held as repealing that limitation *pro tanto*. The fact that the ordinance for this second subscription was not recorded within thirty days after its passage does not invalidate the bonds in the hands of innocent purchasers for value. *Ib.*
3. The act of the Pennsylvania legislature of February 9, 1853, authorized the commissioners of Butler county to issue negotiable coupon bonds in payment for subscription of stock to the Northwestern Railroad Company. This authority was well executed by the signatures of two out of the three commissioners to the bonds. *Curtis v. Butler County*, 24 H. 435.....217.
4. The court affirms the proposition laid down in *Curtis v. The County of Butler*, 24 How., 435, (4 Miller, 217), namely, that the act of the Pennsylvania legislature authorizing counties to take stock in the Northwestern Railroad Company, passed February 9, 1853, is valid, and that such stock may be paid for by the bonds of the county, and that a majority of the commissioners may sign and issue said bonds. *Wood v. Lawrence County*, 1 Black, 386.....516.
5. The legislature, by omitting the name of the counties in the act, did not intend thereby that they had not power to authorize subscription by counties through which the road did not run, nor is the building of the road through the county a condition precedent to issuing the bonds. *Ib.*
6. The provision of the statute that the railroad company shall not sell the bonds of counties received for subscription at less than par does not render the bonds void, and had relation only to their dealing with the county that it should not sustain the loss. *Ib.*
7. In construing the act giving powers to a corporation, neither privileges, powers, nor authorities can pass, unless they are given in unambiguous words; and such an act giving special privileges must be strictly construed. *Moran v. Commissioners of Miami*, 2 Black, 722.....916.
8. The cases in regard to municipal bonds issued to railroad companies reviewed, and their principles reaffirmed. *Ib.*
9. When these bonds and their interest coupons, which are made payable to bearer, are placed upon the market, they are to be treated as commercial securities; and the equities existing between the makers and the original payees cannot be inquired into in an action brought to collect the amount due on them. Effect of recitals in bonds so issued in the hands of innocent holders for value. *Ib.*
10. Where the city of Jeffersonville had, by its common council, determined that three-



fourths of the legal voters had petitioned them to take stock in a railroad company, and they had resolved to do so, but before the bonds were issued the State court had decided that the law conferred on them no such authority, it was competent for the legislature to authorize the council to ratify their former act and make the contract valid. *Bissell v. The City of Jeffersonville*, 24 H. 287.....126.

11. Where the council, after the passage of the act, ratified the former contract, and recited that it was based on a petition of three-fourths of the legal voters, their act was conclusive against the city in a suit upon these bonds or their coupons by innocent purchasers of them for value. *Ib.*
12. In such case the law vested in the council the power to determine whether the requisite number of voters had petitioned for the subscription to the railroad stock; and in a suit by the innocent holder it is not admissible to prove by extrinsic testimony that the required number had not petitioned. *Ib.*

#### OFFICIAL BONDS.

1. A surety in an official bond is liable only as regards his principal's accounting for money actually received by him during his term of office, and cannot be held for money paid by the government to his agent after the term of his office has expired. *Bryan v. The United States*, 1 Black, 140.....402.
2. Nor can the surety be held liable upon the hypothesis, unsupported by evidence, that his principal had raised money on the anticipation of drafts for which he had made requisition, but which drafts had not been received by him prior to the expiration of his term, and of which there is no evidence that he or his agent ever did receive them or their proceeds. *Ib.*

#### PARTNERSHIP.

1. The members of a joint stock association for dealing in lands are partners; and the interest of one partner is subject to levy and sale, under execution, in the same manner and with like effect as partnership personal property. *Clagett v. Kilbourne*, 1 Black, 346.....494.
2. In such case, the purchaser takes only the interest of the partner, subject to an accounting and adjustment of the partnership dealing. *Ib.*
3. Such a purchaser cannot maintain ejectment for the land. His remedy is by a bill in equity for a settlement of the affairs of the joint stock company, and perhaps for partition. *Ib.*
4. A member of a mercantile firm may make a contract for his individual services with a third person in whom his partnership has no interest; and his conducting the correspondence through the partnership, and even his agreement to give his partners an interest in that particular business, does not prevent him from sustaining an action in his own name for the services rendered under the contract. *Law v. Cross*, 1 Black, 533.....592.
5. Where the property of A, B, and C, partners, was attached on mesne process, and delivered up on a bond conditioned for its production if judgment should be obtained against the defendants, and the suit was afterwards dismissed as to A and B for want of jurisdiction, and judgment against C's administrators: Held, that the sureties were liable, because the judgment was recovered for the partnership debt, and the partnership property was released by virtue of the bond. *Inbusch v. Farwell*, 1 Black, 566.....610.
6. That by reason of the act of February 28, 1839, suit may be maintained against part of the obligors in the bond in the federal court, though another obligor is beyond the reach of the court's jurisdiction and is not served. *Ib.*

#### PATENTS AND PATENT LAW.

1. A specification and claim in a patent which describes only such machinery as had been formerly used in the same manner, cannot be made valid by a new use or ap-

- plication to an enlarged operation. If the adaptation of the machine to a new use is matter of invention, it should be claimed, and the new means by which it is so adapted set forth in the specification or claim. *Phillips v. Page*, 24 H. 164.....48.
2. It is only necessary, in notice of prior use, to give the name of the party, his place of residence, and the place of prior use. A notice, therefore, which gives the date of prior use does not limit the party to that date in his proof. *Ib.*
  3. A patent surrendered for the purpose of a reissue, under the 13th section of the act of July 4, 1836, is a legal cancellation of it, and in judgment of law extinguishes it. *Moffitt v. Garr*, 1 Black, 273.....468.
  4. To a suit commenced before such a surrender, a plea that since the commencement of the action the plaintiff has surrendered his patent and obtained a reissue, is a valid defense. *Ib.*
  5. But it does not follow that money paid under the former patent can be recovered back. They may be voluntary payments, or, if under judgments, are protected as *res judicata*. *Ib.*
  6. The patent, for an infringement of which this suit is brought, is for a combination, and the declaration is for an infringement of the patent as described in that instrument. Plaintiff cannot in such case, when it is shown that defendant did not use part of the combination, rely upon the fact that such part is of no value in the combination. *Vance v. Campbell*, 1 Black, 427 .....530.
  7. Having both in his patent and in his declaration set out his combination as an entirety, he is bound by it, and cannot charge as an infringement anything less than the use of the whole. The 9th section of the act of 1837 (5 U. S. Statutes, 194) has reference to a claim of more than the patentee invented, in a case where the part invented can be clearly distinguished from that which he has not. *Ib.*
  8. A contract by one with an inventor, engaging his services and ingenuity in perfecting a machine for his benefit, gives him no claim to an improvement made after the expiration of that contract. *Appleton v. Bacon & North*, 2 Black, 699.....806.
  9. And when, by some mistake or irregularity, the patent which was applied for by the inventor for this improvement has been issued to his former employer, the patent must be surrendered and canceled. *Ib.*

#### PLEADING.

1. It is an elemental principle of the common law, where a contract is jointly payable to several, a defendant can take advantage of the non-joinder of all the obligees by demurrer or in arrest of judgment on the general issue. *Farni v. Tesson*, 1 Black, 309.....477.
2. The objection is not obviated by an allegation in the declaration that plaintiff's is the sole beneficial interest in the bond, the others being sheriffs, agents, and mere nominal obligees. *Ib.*
3. This principle of the common law, though technical, cannot be disregarded by the federal courts without the aid of a statute. *Ib.*
4. In a suit by the vendor on a contract to make a good title for the purchase money, it is not a sufficient averment that he had been ready and willing to make a deed. It is necessary that it should be also averred that such a deed would convey a good and perfect title. *Washington v. Ogden*, 1 Black, 450.....542.

See BANKS AND BANKING, 2; EJECTMENT 1; EQUITY, PRACTICE, 2.

#### PRACTICE IN CIRCUIT COURT.

1. It is not error in a federal court of original jurisdiction to permit, on proper showing, a plea in bar to be withdrawn, and a plea to the jurisdiction, to wit, want of proper citizenship, to be filed. Such a course is proper, and is also the exercise of a discretion not reviewable in this court. *Eberly v. Moore et al.*, 24 H. 147.....43.
2. To an action of replevin, a plea that the goods and chattels replevied are not the

- property of the plaintiff, is good in bar of the action. *Dermott v. Wallach*, 1 Black, 96.....382.
3. It is error to go to trial and take a verdict that there was no rent in arrear, and render judgment thereon, paying no attention to the plea of no property in plaintiff. *Ib.*
  4. In such case the judgment must be reversed as a mistrial, and a new trial ordered. *Ib.*
  5. The court comments severely on the practice of incorporating large masses of evidence, including all offered or given, and, on general exceptions, to the charge of the court. *Johnston v. Jones*, 1 Black, 210.....440.
  6. The federal courts follow the State courts as to rules of evidence, including competency of witnesses, when there is no act of congress to the contrary, and in Ohio, where plaintiff was offered and was by the law of that State competent as a witness, his rejection is error, for which the judgment must be reversed. *Vance v. Campbell*, 1 Black, 427.....530.
  7. When the testimony which this witness would have given is not disclosed, this court cannot presume it was immaterial to save the judgment. *Ib.*
  8. The court is not bound to give or refuse every one of a long series of instructions for the jury prayed for by a party. If it appear that the law was sufficiently explained to the jury, and the law as given was sound, there is no error on which it can be reversed for refusing instructions asked. *Law v. Cross*, 1 Black, 533.....592.
  9. This court reasserts the doctrine that where the statutes of a State have made a party to a suit a competent witness in his own behalf, the federal courts are bound by the law when sitting within that State. *Wright v. Bales*, 2 Black, 535.....806.
  10. Where a bill of exceptions shows on its face that exceptions were taken at the time of the ruling of the court, it is immaterial as to what time during the term they were reduced to writing and signed by the judge and filed with the clerk. *Russell v. Ely*, 2 Black, 575.....837.
  11. Where the question is as to the accounting for supplies, and the report of the master merely found the amount due, without stating an account, this court will not reverse such a finding. The appellant should have had a new reference to the master, with directions to state an account, and to report evidence, to which, if he objected, he could file exceptions. *The Ship Potomac*, 2 Black, 581.....842.
  12. That libellant had some one included with him in the furnishing of supplies is no ground for reversing the decree in his favor. *Ib.*
  13. The federal courts adopt the decisions of the State courts in construing State statutes as the law of such cases; and where these courts have varied, this court accepts the latest decision of the highest court of the State as a sound one. *Leffingwell v. Warren*, 2 Black, 599.....854.
  14. The supreme court of Wisconsin having decided that a tax deed, however defective, is, when recorded, color of title, so as to sustain the limitations of three years' possession under it as a bar to any action by the true owner, this court is bound by that decision. *Ib.*
  15. It is therefore immaterial, in such case, that the tax deed is void on its face if it shows a sale and the tax was unpaid. *Ib.*

See BANKS AND BANKING, 2; EJECTMENT, 1, 2, 3, 4, 5, 6, 7.

## PRACTICE IN SUPREME COURT.

1. Where a rule, either at common law or in equity, issues from this court in the exercise of its original jurisdiction against a State, it should be served upon the governor or chief magistrate of the State, and upon its attorney general. *Kentucky v. Dennison*, 24 H. 66.....10.
2. Where a judgment is recovered in ejectment against a tenant, his landlord having defended the suit, can take a writ of error in the name of the heirs of the tenant after his death, and they cannot have the writ dismissed if the landlord will give a bond to protect them against costs. *Kellogg v. Forsyth*, 24 H. 188.....64.

3. Where the question is of the jurisdiction of this court over a judgment of a State court, it may be determined from an examination of the pleadings, bill of exceptions, or certificate of that court; but the assignment of errors and the published opinion of the court make no part of the record, to which alone this court can resort. *Medberry v. State of Ohio*, 24 H. 413.....204.
4. Service of citation on a writ of error, where the defendant in error is dead, cannot be legally made on the widow or executor of his attorney in the court below, who is also dead. *Bacon v. Hart*, 1 Black, 38.....347.
5. Nor is it sufficient that it was served on the law partner of the deceased attorney, unless the name of the latter appeared of record as attorney in the case. This court does not take judicial notice of law partnerships in practice in the courts. *Ib.*
6. Where an appellant, after he had taken exception to the amount of damages in the master's report, had admitted the amount to be correct, for the purpose of making the sum sufficient for allowance of an appeal, he will not be heard in this court to controvert that amount. *The Steamer New Philadelphia*, 1 Black, 62.....361.
7. Under proper circumstances this court will award a *certiorari* even at the third term after the appeal is filed, but will not permit it to delay the hearing. *Clark v. Hackett*, 1 Black, 77.....371.
8. It is no sufficient ground to dismiss a writ of error, on motion in this court, that there is no error apparent on the record. To attempt to ascertain this on motion, is to decide the merits of the case before it is reached in its regular order on the docket. *Hecker v. Fowler*, 1 Black, 95.....381.
9. This court will not interfere with the discretion of the court below in refusing evidence offered in rebuttal which should have been introduced at first as evidence in chief. *Johnston v. Jones*, 1 Black, 210.....440.
10. Where the appellant has purchased by a friend, the debt against which he appeals, and carries on a pretended controversy by counsel paid by himself on both sides, on a record selected by them for the purpose of obtaining a decision injurious to the rights of persons not before the court, the appeal will be dismissed on affidavits proving these facts. *Cleveland v. Chamberlain*, 1 Black, 419.....528.
11. In the appellate court it cannot be presumed in aid of the verdict that the sufficiency of the plaintiffs' title was proved, because the record shows affirmatively that no such proof was given. *Washington v. Ogden*, 1 Black, 450.....542.
12. This court cannot look beyond the record as transmitted from the court below in a chancery appeal, any more than in a writ of error, with a view to affect its judgment in the case. *The United States v. Knight*, 1 Black, 488.....563.
13. Hence, after its judgment is pronounced, it will not hear a motion founded on affidavits of newly-discovered evidence to open the decree here and remand the case for a further hearing in the court below. *Ib.*
14. The court does not doubt its power, however, to set aside a judgment and order a re-argument at the same term, but this is only done when upon the record of the case one of the judges who concurred in the judgment has since seen cause to doubt its correctness. *Ib.*
15. An appellant here cannot set up as a ground for reversing the decree of the circuit court that it was rendered for more than the appellee had recovered in the district court—there being no cross appeal—when the circuit court merely changed the form of the decree without changing its substance. *Clifton v. Sheldon*, 1 Black, 494.....567.
16. When a case is brought here on writ of error to a circuit court of the United States under the 22d section of the judiciary act, this court will not dismiss it for want of a suggestion of errors; but if it appears that there was no bill of exception or other ruling of the court found in the record of which error can be predicated, the judgment will be affirmed. *Taylor v. Morton*, 2 Black, 481.....770.
17. James & Co. were purchasers, under a decree of mortgage foreclosure, of the western division of the La Crosse railroad, and the present appeal was from a decree of fore-

closure against the eastern division, under different mortgage authorized by statutes of the State: Held, that James & Co. could not intervene in this court to contest a decree by foreclosure for a larger sum than the decree rendered in the circuit court, on the ground that, as they had bought all the rolling stock, this decree might prejudice their rights. *Bronson & Soutter v. La Crosse and Milwaukee R. R. Co.*, 2 Black, 514 .....798.

18. Nor on the ground that, as general creditors of the defendant corporation, the increased amount of the decree might prejudice their interests as such. *Ib.*
19. Nor is it anything to them that a judgment creditor of the road was not made a party to the suit. *Ib.*
20. A decree in a foreclosure suit which ascertains the amount due, and directs the land to be sold in default of payment, is a final decree, so as to be the foundation of an appeal. *Ib.*
21. When the State court of Wisconsin, under statute concerning fraudulent assignments, which is a copy of 13th Elizabeth, chapter 5, held an assignment void, because it authorized the assignee "to sell upon such terms and conditions as in his judgment may appear best for all parties," this court will follow that construction of these statutes by those courts. *Sumner v. Hicks*, 21 Black, 532.....804.
22. But a second assignment, made on purpose to correct this error, and which is not obnoxious to that charge, is good, notwithstanding the making of the first. *Ib.*
23. When the bill of exceptions does not embody the witness's testimony, this court must suppose that there was in it sufficient to justify the court's statement of its effect. *Russell v. Ely*, 2 Black, 575.....837.
24. The deposition of that witness, sent up to this court by the clerk and duly certified cannot be received as part of the record, because it is not made part of the bill of exceptions, by reference or otherwise. *Ib.*

See COMMON CARRIERS, 8.

#### PRIZE OF WAR.

1. The first question to be determined in these cases is whether, at the time of the capture of the several vessels above named, there existed a lawful blockade which they are charged with violating. *The Prize Cases*, 2 Black, 635.....876.
2. There can be no lawful blockade without the existence of war—such war as will justify a resort to this mode of subduing the hostile force. *Ib.*
3. A war may exist when one of the belligerents claims sovereign rights as against the other. Where a party in rebellion occupy and hold in a hostile manner a certain portion of territory, have cast off their allegiance and declared their independence, have organized armies and commenced hostilities against their sovereign, the world acknowledges them as belligerents and the contest as a war. *Ib.*
4. A civil war is never solemnly declared. An insurrection becomes such by the amount of its numbers, power, organization, and purpose of those who take part in it; and the lawful government exerts itself to put it down without a formal declaration of war against it. *Ib.*
5. But the actual existence of such a war may, from its very nature, become a fact in the domestic history of the country of which the courts must take judicial notice. *Ib.*
6. Where the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that courts of justice cannot be kept open, civil war exists, and hostilities may be prosecuted on the same footing as if those opposing the government were foreign enemies invading the land. *Ib.*
7. It was the right and duty of the President of the United States, in the absence of congress, to recognize and to meet this condition of actual territorial war which he did not inaugurate or proclaim; and as the war was a *fact* which could not be ignored, it was within the scope of his authority to institute the blockade of the hostile ports. *Ib.*
8. Neutrals were bound to respect this blockade as much as any other. *Ib.*

9. The present civil war has assumed a territorial character, dividing the country into two parts by a line of bayonets. All persons residing south of this line are, by virtue of their domicile, enemies in this war to the government. *Ib.*
10. As the principle on which the right of belligerent capture on the high seas is, that property, unless captured, may, by reason of the residence of its owner, come to be used in aid of the public enemy, the other side has the right to capture it as a means of crippling that enemy's resources. *Ib.*
11. This principle applies to citizens of the United States domiciled within the rebel lines, without regard to the part they may have taken in the war or their sentiments on the subject. *Ib.*
12. Nor is the government forbidden to exercise this right of war by the fact that it is sovereign and can punish criminals, nor by any of the provisions of the constitution. The government is at liberty to exercise its right of sovereignty, or the rights which a state of war gives it, without consulting its enemies. *Ib.*
13. As to the *Amy Warwick*, the owners of the vessel and the cargo were all residents of Richmond, Virginia, and, without reference to the blockade, the vessel and cargo were both rightfully condemned as enemy property. *Ib.*
14. As to the *Hiawatha*, we are of opinion that the British minister had a right, from his correspondence with the state and navy departments, to believe that fifteen days after notice of blockade would be allowed for foreign vessels to leave the ports. *Ib.*
15. But in order to obtain an enemy cargo she remained until after the expiration of the fifteen days, and thus voluntarily subjected herself to the danger of capture. *Ib.*
16. There is no provision in the proclamation of blockade for warning vessels. If there was any such warning necessary, it could only apply to vessels coming into port, and in no event could it be necessary as to a vessel which had full knowledge of the blockade and was in correspondence with the government about it. The cargo must share the fate of the vessel, and both were properly condemned for violation of the blockade. *Ib.*
17. The *Brillante*: the evidence in this case shows that the owner of the vessel, who was aboard, violated the blockade of New Orleans, after warning, in entering that port, and was captured in attempting to violate the blockade by escaping with a cargo. Both vessel and cargo were properly condemned. *Ib.*
18. In regard to the *Crenshaw*, the only question is of enemy property. The vessel and a large part of her cargo were owned by residents of Richmond, Virginia, and were properly condemned. The claim of the firm of Ludlam & Watson, for part of the cargo, must be governed by the fact of the residence of Watson, the active member of the firm in Richmond. *Ib.*
19. *Irvin & Co.*, of New York, had tobacco on board, purchased in Richmond before the commencement of hostilities. Whether they had the right to withdraw this generally after the war or not, they should have the benefit of the fifteen days' grace allowed to others, and thus protect their property. *Ib.*

#### RES JUDICATA.

1. The cases of *Boston v. Lecraw*, 17 How. 426, (21 Curtis, 590,) and *Richardson v. City of Boston*, 19 How. 263, (1 Miller, 675,) considered and explained. *Richardson v. The City of Boston*, 24 H. 188.....65.
2. Proceedings on an indictment may be introduced as evidence in a civil suit, but they are not conclusive, and if the judgment of the court was founded on erroneous instructions to the jury, they are of little value. *Ib.*
3. A decree in chancery in a foreclosure suit, in which want of consideration and fraud in the original contract is set up, and the decree is against the defense, is a good answer to the same defense in a suit at law on the notes secured by the mortgage between the parties to the chancery suit. *Thompson v. Roberts*, 24 H. 233.....94.
4. It is no objection to the decree as evidence that there were other parties to the chan-

cery suit who are not parties to the present suit, provided the fact was decided as between the present parties. *Ib.*

5. That the court submitted to the jury the question whether the same defense was set up in the chancery suit, instead of instructing them that it was the same defense, is no error to the prejudice of the defendants, the plaintiffs here, and can be no ground for reversing the judgment. *Ib.*
6. In a suit upon a special contract, the record of a former suit and judgment between the same parties, in which plaintiffs counted on this special contract, and also on common counts, is admissible as evidence in behalf of plaintiffs, who recovered in the former suit. *The Steam Packet Co. v. Sickles*, 24 H. 333.....157.
7. But such verdict and judgment are not conclusive on defendants as to the special contract, because the jury may have found their verdict on the common counts of that declaration. *Ib.*
8. The action of the court in rendering a judgment on that verdict on the special count does not make that judgment and verdict conclusive in the second suit. *Ib.*
9. Therefore defendants should have been permitted to give evidence, as they offered to do, of what was in issue before the jury, and tried by them in the former suit. *Ib.*
10. Where the subject-matter of a suit has been litigated in the courts of the District of Columbia, and the fund remitted to the bankrupt court in New Hampshire for distribution, and the appellant and complainant resumed the litigation there, on the ground that the decree in the first case was obtained by fraud: Held, that the bill was rightfully dismissed, by reason of a total failure to prove its allegations. *Clark v. Hackett*, 1 Black, 77.....371.
11. A decree of a court of chancery determining and deciding the title, as between the parties to real estate, rendered by a court of competent jurisdiction, is conclusive on both parties to that suit in any other court. *Parrish v. Ferris and others*, 2 Black, 606.....860.
12. This applies to the relations of the State and the federal courts, as well as to other courts, and to a subsequent action of ejectment brought by one of the parties. *Ib.*
13. The decree of the court in a suit to quiet title, brought under the statute of Ohio by one in possession against one out of possession, where the question of title is adjudicated by the decree, is as conclusive upon both parties to that suit as any other decree settling the rights of the parties. *Ib.*

EQUITY, GENERAL PRINCIPLES, 2; *MRS. GAINES' CASE*, 6, 7.

#### RIPARIAN RIGHTS.

1. Bridge piers and landing places, as well as wharves and permanent piers, are often constructed by the riparian proprietor on the shore of navigable rivers, bays, and arms of the sea, as well as on the lakes: and where they conform to the regulations of the State, and do not extend below low-water mark, they are not nuisances, unless they are an obstruction to the paramount right of navigation. *Dutton v. Strong*, 1 Black, 22.....339.
2. The lakes are not navigable in any proper sense in certain places for a considerable distance from the shore; and when this is the case, the adjacent owner can make his pier; but this right terminates at the point of navigation. *Ib.*
3. Piers and wharves, though the property of an individual, may be either for public or private use, though generally for the public. *Ib.*
4. But a riparian owner may build one of these structures for his own exclusive use and benefit; and if confined to the shore of the sea or the unnavigable waters of the lake, no implication arises that it was constructed for public use. *Ib.*
5. When those in charge of a vessel had attached her, during a violent storm, to such a bridge pier by ropes and chains, and it became apparent that there was great danger of the destruction of the bridge pier by the vessel, the owners of the former had a right, after due warning, to cut the vessel loose, and are not responsible for her loss by her coming in contact immediately with another pier. *Ib.*

6. The survey and plat by which the United States sold the land under which plaintiff claims showed the east boundary to be the lake and the south boundary the Chicago river. The plat represents the Chicago river as running about due east with the lake. In point of fact, when this survey was made this was an artificial channel. The main channel diverged southwardly and entered the lake at a different point, making a sand bar, which is the subject of the present contest: Held, that the grantee is bound by the survey and map as to the quantities specified in his patent, and acquired no claim to the sand bar in question. *Bates v. The Illinois Central R. Co.*, 1 Black, 204.....437.
7. The government of the United States has the right, through its officers, to determine the boundaries by which it sells or grants its lands, and a purchaser is bound by descriptive calls, surveys, and plats designating what he buys. *Ib.*
8. It was properly left to the jury to say whether, at the date of the acts under which plaintiff claims, the land in controversy was within the boundaries by which he purchased. *Ib.*
9. This sand bar did not exist at the date of this suit, but had been washed away, and was land under water permanently, over which defendant's railroad was carried; and the question of plaintiff's loss by this washing away of the sand bar, though much discussed, had no application, since the jury decided that he never owned it. *Ib.*
10. In deciding whether the lot purchased by plaintiff of Johnston had a water front, the fact must be determined by the condition of the lot when the deed was made, and not by a reference to the condition of things when Kinzie made his title bond to another person, on which his deed to Johnston was founded. *Johnston v. Jones*, 1 Black, 210.....440.
11. As the lot of plaintiff had no water front when he received his deed, any instructions of the court to the jury as to the mode of dividing accretions between water lots which have a claim to them, can work no injury to plaintiff in error. But this court adheres to and reiterates the rule laid down in this case when formerly before it, as reported in 18 How. 150, (1 Miller, 138.) See also *Deerfield v. Arms*, 17 Pickering, 45, the language of which is here adopted. *Ib.*
12. A deed from Robert A. Kinzie, the patentee, to John H. Kinzie described this lot by reference to the original plat, which *did* show a water front; but the deed of John H. Kinzie to plaintiff referred to the plat *as recorded*, which did *not* show a water front. *Ib.*
13. A deed made by John H. Kinzie to plaintiff long since this suit was commenced, purporting to correct a mistake by making the deed conform to the original plat, was rightfully excluded from the jury. *Ib.*
14. The evidence offered to show the nature of accretions by Allen's map was inadmissible, because the evidence shows that Allen's map was not the map, and was not reliable evidence. *Ib.*
15. All grants of land bounded by fresh water rivers, where the expressions designating the water line are general, confer proprietorship to the middle thread of the stream. *Jones v. Soulard*, 24 H. 41.....8.
16. The owner of such a grant becomes entitled to accretions as they are formed. *Ib.*
17. This rule applies to the great navigable rivers, such as the Mississippi, as well as others. *Ib.*

See MISSOURI LAND TITLES, 1; EQUITY, GENERAL PRINCIPLES, 1.

#### SUNDAY LAWS.

By a contract between plaintiffs and defendants, the goods which plaintiffs had agreed with shippers to carry from Baltimore to Petersburg were received by the latter at City Point, and delivered at Petersburg. It had been the custom to store these goods in defendants' warehouse on Sundays, when the boat arrived at City Point on



that day, and keep them over until Monday: Held, that whether the work of placing these goods in the warehouse on Sunday, which was done by plaintiffs, was a violation of the Sunday law of Virginia or not, it did not affect the obligation of defendants, as carriers, to keep them safely, and deliver at Petersburg, and that plaintiffs having been sued, and compelled to pay for their loss by fire in defendants' warehouse on that day, could recover against the defendants. *Powhatan Steamboat Co. v. Appomattox R. R. Co.* 24 H. 247.....101.

SURETIES.

Where a bond for the release of property taken in replevin was given to the marshal who held it under the writ of replevin, and he permitted one of the principals in the bond, with his consent, to erase his name from it, this discharged the sureties in the bond from all liability on it. *Martin v. Thomas*, 24 H. 315.....147.

TAXES AND TAXATION.

1. The legislature of the State of Wisconsin authorized the town of Sheboygan to subscribe to a railroad or railroads, and provided that the taxes necessary to pay the bonds issued for such subscription should be levied exclusively on the real estate of said city: Held, that a prior act, by which no such distinction was made as to taxation, constituted no contract with the bondholder against exempting personal property from taxation for that purpose. *Gilman v. Sheboygan*, 2 Black, 510.....788.
2. Nor are these acts liable to the objection that a tax for that purpose is taking private property for public use without due compensation. *Ib.*
3. This court follows the court of Wisconsin in holding that the act requiring this tax to be levied exclusively on real estate is a violation of Article VIII, Sec. 1, of the constitution of that State, which declares that "the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe." *Ib.*
4. The statute of New York, under which the tax is levied which is here in dispute, is a tax upon the capital of the stock at its assessed value in whatever it may be invested, and is not a tax upon its nominal capital stock, without regard to its value. *Bank of Commerce v. The Commissioners*, 2 Black, 620.....870.
5. The latter tax might be sustained as a tax upon the franchise of banking, without regard to the kind of property in which the capital was invested. The former is no such tax, but is a tax upon property according to its value. *Ib.*
6. Where it is made to appear that the capital on which the tax is thus assessed as a whole is largely invested in stock, bonds, or other securities of the United States, it is a tax to that extent upon those securities. *Ib.*
7. Such a tax, if permitted, would enable the States to tax the loans, bonds, and other securities out of the markets of the States, and would in effect place the power of the general government to borrow money at the mercy or discretion of the States. *Ib.*
8. Such a power in the States is therefore inconsistent with the power conferred on the United States by its constitution to borrow money, and any State law which authorizes such a tax is void. *Ib.*

See CONSTITUTIONAL LAW, 12, 13; CONTRACTS, 1, 2; LAND TITLES, 11, 12.

TEXAS LAND TITLES.

1. Any defect in the power of Steele to act as commissioner in the colony of Nashville or Robertson has been cured by the statute of 1841 of the republic of Texas. *Davila v. Mumford*, 24 H. 214.....83.
2. The phrase, "want of intrinsic fairness and honesty," in the 15th section of the act of limitations of the State of Texas, has relation to defects in the chain of title of defendant set up as color of title, and not to a knowledge on the part of defendant of the existence of a superior title. *Ib.*
3. The statute of 13th Elizabeth, concerning fraudulent conveyances, is in force in Texas; and it was error in the court to refuse to admit evidence that the deed under

which defendant held was made in fraud of creditors, plaintiffs themselves being creditors. *Chandler v. Von Roeder*, 24 H. 224.....87.

4. Under the colonization laws of Mexico, the consent of the federal executive of Mexico was essential to the grant of lands within the border and coast leagues; and the courts of the State of Texas have uniformly held that the permission of the federal government to *colonize* within these lines did not dispense with the necessity of procuring the assent of the federal executive to the grants of the *State* within the littoral leagues. *League v. Egery*, 24 H. 264.....111.
5. Without inquiring whether this was the sound interpretation of the Mexican law as applicable to those grants, this court adopts the rule now well settled by repeated decisions as the rule of property in Texas on that point. *Ib.*

#### TOWNS AND CITIES.

1. A municipal corporation is liable for injuries received by an individual by reason of the unsafe condition of the streets of which it has control. *Chicago v. Robbins*, 2 Black, 418.....732.
2. It has a remedy also against the individual whose fault it was that the street was left in that condition. *Ib.*
3. Such a person so liable is bound by the verdict of the jury and judgment of the court against the city, if he had an opportunity to defend the suit, and failed to do so. Express notice of the suit and request to defend it are not necessary to bind him. *Ib.*
4. But this does not estop him from showing that it was not through his fault the injury occurred, but does bind him as to the amount, if on trial he is found liable at all. *Ib.*
5. The owner of the lot on which the injury occurred cannot relieve himself from liability for its dangerous condition by any agreement with the contractor who puts up a building for him. His obligation to keep his property in safe condition for the use of the streets cannot be thus evaded. *Ib.*
6. Notwithstanding the adoption of a different rule by the State courts where the trial took place, as it is a question to be determined by the common law, in a matter which has not become a rule of property, this court is not bound by the decisions of the State court. *Ib.*
7. The law is well settled that municipal corporations, upon which the duty is imposed to construct and keep in repair streets, bridges, &c., and upon which are conferred the means of accomplishing this duty, are liable for any special damages growing out of a neglect of this duty. 1 Black, 39, (4 Miller, 349.) *Nebraska City v. Campbell*, 2 Black, 590.....848.

See CORPORATIONS, 7, 8; COURT AND JURY, 1; EQUITY PRACTICE, 11, 12.

#### USURY.

1. To constitute usury, there must either be a loan and a taking of usurious interest, or the taking of more than legal interest, for the forbearance of a debt or sum of money due. *Hogg v. Ruffner*, 1 Black, 115.....390.
2. The sale of land or other property on long credit, at a price increased by reason of the credit much more than the lawful rate of interest, is not a usurious transaction. *Ib.*
3. Nor does it make it usury because the land was sold and bought as a means of settling existing indebtedness between the parties, about which there was difficulty, at a price much larger than that at which the vendor agreed to sell it for cash. *Ib.*

#### VENDOR'S LIEN.

1. The unpaid purchase money for real estate is treated in equity as a lien upon the land sold, because when a person has got the estate of another he ought not in conscience to be allowed to keep it without he gives the consideration. *Chilton v. Lyons*, 2 Black, 458.....763.

2. A jury having in this case found that the receipt set up was not the receipt of the vendor, and that the purchase money was not paid, and there being no intervening equities, the court below rightfully sustained the vendor's lien. *Ib.*
3. It is wholly immaterial in this case that the purchaser was a *feme sole*, and whether she had or had not a separate estate with regard to which she might contract the debt. The obligation to pay the lien attached at the time, and as the incident to any valid sale of the land. *Ib.*

#### WILLS.

1. A condition to a bequest that it shall be forfeited if the devisee sets up any other claim against the estate of the testator, is a lawful and valid condition; and it is broken when the devisee brings a suit, under other deeds or instruments, against the estate, though defeated in that suit. *Rogers v. Law's Executors*, 1 Black, 253.....458.
2. Lawrence Benson, by his will, gave to his son, Benjamin Benson—1. The land occupied by George Williams, to do and dispose of as he might think proper; 2, the homestead of the testator; 3, he charged this devise with a legacy of \$1,500 to his grandchildren by a daughter; and 4, he gave his widow a life estate in all the lands during widowhood: Held, that notwithstanding the words "to dispose of as he might think proper" in the first clause, and their absence in the second, they both vested a fee simple in remainder in Benjamin Benson. *King v. Ackerman*, 2 Black, 408.....728.
3. That charging them both with a legacy tends to support that construction, which nothing in the language of the granting clause forbids. *Ib.*

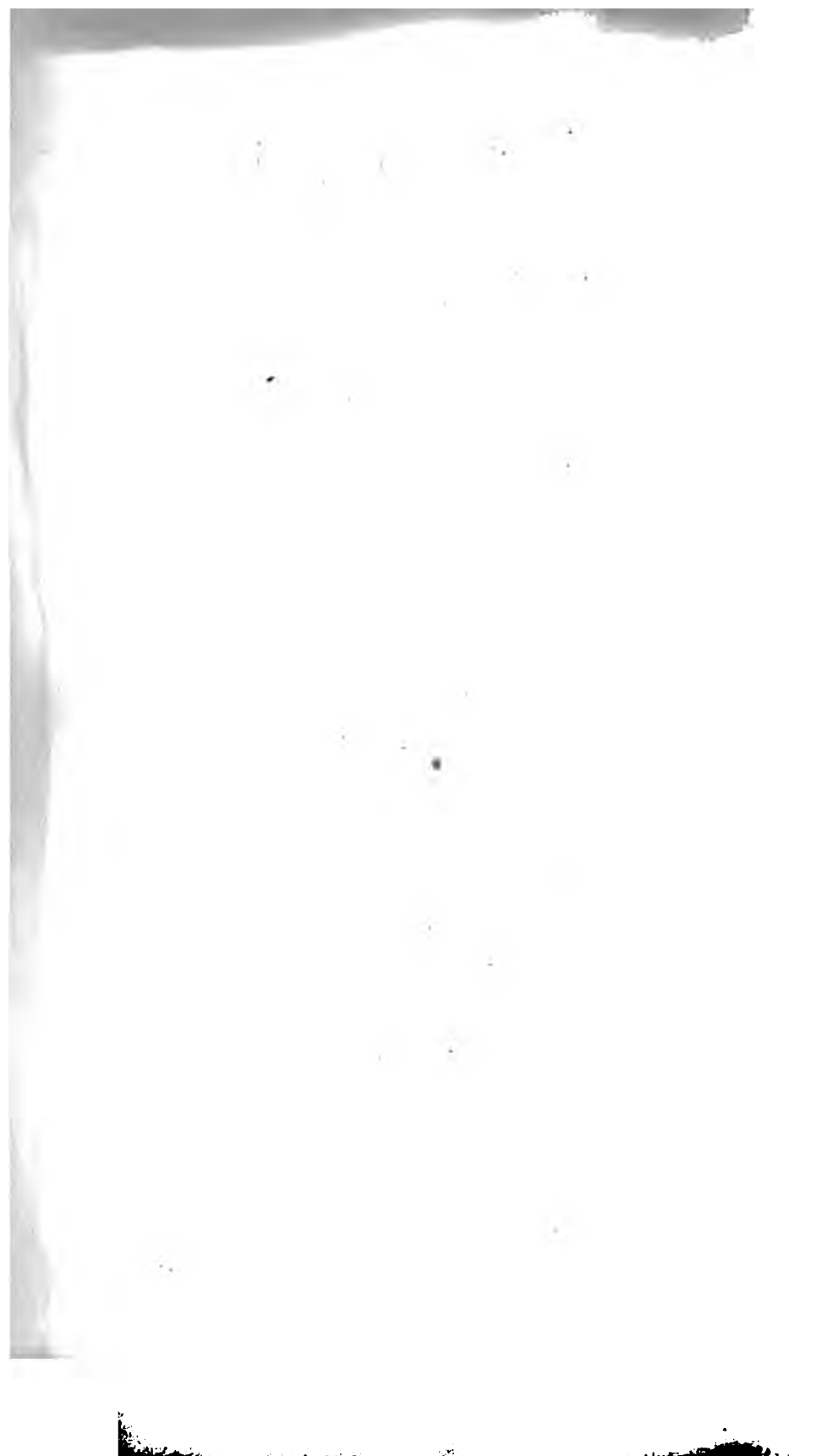
See *Mrs. Gaines' Case*, 1, 2, 3.

















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